Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

LEROY "BUD" BENSEL, JAMES ARTHUR, PATRICK BRADY, THEODORE A. CASE, MATTHEW J. COMLISH, DARSHANPRIT DHILLON, LEMUEL A. DOUGHERTY, MICHAEL V. FINUCAN, JOHN S. HEFLEY, HOWARD B. HOLLANDER, ROBERT A. PASTORE and SALLY YOUNG, individually and as members of a class consisting of former Trans World Airlines, Inc., pilots employed by TWA Airlines, LLC as of April 2001,

Petitioners,

vs.

ALLIED PILOTS ASSOCIATION, TWA AIRLINES, LLC, AIR LINE PILOTS ASSOCIATION and AMERICAN AIRLINES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a union which acts affirmatively and in bad faith to harm workers who are imminently and inevitably to become members of the bargaining unit may be held liable for breach of the duty of fair representation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, a class of former TWA pilots certified herein pursuant to Rules 23(b)(1)(A), (b)(1)(B), and (b)(2) of the Federal Rules of Civil Procedure, respectfully petition this Court for a writ of *certiorari* to review the Opinion and Order of the United States District Court for the District of New Jersey, dated July 18, 2003, as affirmed in part and reversed in part and remanded by the Opinion of the United States Court of Appeals for the Third Circuit, filed on October 26, 2004. The Court of Appeals denied a petition by defendant Air Line Pilots Association for a rehearing *en banc* herein on November 23, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix at A-1. It is also reported, and may be found at *Bensel v. Allied Pilots Ass'n,* 387 F.3d 298 (3d Cir. 2004). The Third Circuit affirmed in part, and reversed in part, the July 18, 2003 Opinion and Order of the United States District Court for the District of New Jersey, which is reproduced in the Appendix at A-59. That decision is also reported, and may be found at *Bensel v. Allied Pilots Ass'n,* 271 F. Supp. 2d 616 (D.N.J. 2003).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rules 13.3 and 30.1, this petition is filed within 90 days of the date of the denial by the Court of Appeals, on November 23, 2004, of a petition by defendant Air Line Pilots Association for *en banc* rehearing.

STATUTORY PROVISION INVOLVED

The duty of fair representation is a duty imposed upon a union representative pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

STATEMENT OF THE CASE

Petitioners, the plaintiff class herein ("Petitioners" or the "Class"), respectfully seek review on certiorari of an opinion and order of the U.S. Court of Appeals for the Third Circuit dated October 26, 2004, which affirmed, in all but one respect, an order of the U.S. District Court for the District of New Jersey dated July 18, 2003, granting summary judgment to all defendants and dismissing all counts of the Second Amended Complaint (the "Complaint").[1] In particular, Petitioners seek review of the Court of Appeals' affirmance of the dismissal of Count II of the Complaint, in which the Class alleged breach of the duty of fair representation ("DFR") against the Allied Pilots Association ("APA").

Petitioners are a certified class of approximately two thousand three hundred (2,300) airline pilots formerly employed by Trans World Airlines, Inc. ("TWA"). Petitioners originally commenced this action to challenge the imposition upon them, without their consent, of a seniority integration plan ("Supplement CC") resulting from American Airlines' ("AA") purchase of TWA's assets, and the hiring of the Class by AA's subsidiary and alter ego, TWA LLC, in April 2001. Of their total number, the vast majority of the Class have lost their seniority and been furloughed by AA as a result of implementation of Supplement CC.

At all relevant times, APA has been the certified union representative for the incumbent AA pilots. APA also became the certified bargaining representative of the Class on April 3, 2002, as a result of the National Mediation Board's ("NMB")

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[1] The Third Circuit reversed the District Court's prior grant of summary judgment on Count I of the Complaint — alleging breach of the duty of fair representation against defendant Air Line Pilots Association ("ALPA"). No review is herein sought of that part of the Third Circuit's decision, nor of its affirmance of the District Court's grant of summary judgment upon Petitioners' various other statutory and common law causes of action, *except* Count II. *See* discussion *infra*.

finding, on March 5, 2002, that AA and TWA LLC were a "single carrier." The Air Line Pilots Association ("ALPA") had been the bargaining agent for the Class while the Class had been employed by TWA, and thereafter when and after AA and TWA LLC voluntarily recognized ALPA as the Class' collective bargaining agent. This remained the case until April 3, 2002, when APA's certification was extended to cover the Class (in addition to the incumbent AA pilots). The Class originally brought this action against its employers, AA and TWA LLC, and both of the unions involved — ALPA and APA.[2]

Before the commencement of any discovery, all of the defendants filed motions to dismiss. The District Court treated and granted those motions as motions for summary judgment. An appeal was thereafter taken, and on October 26, 2004, the Third Circuit issued its opinion and order reversing and reinstating Count I of the Complaint, but affirming the District Court's dismissal of Counts II through IX.

The sole cause of action at issue here, Count II, asserted a claim for breach of the DFR against APA, including for conduct in which it had engaged *before* April 3, 2002 — the date it formally became the certified representative of the Class. APA represented the incumbent AA pilots, and was to

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[2] The instant action was originally initiated in February 2002 by APA against the Class. APA sued the Class in Texas, seeking a declaratory judgment that it neither owed nor breached any DFR to the Class, and that Supplement CC was valid, binding and enforceable against the Class. That original action was dismissed for lack of personal jurisdiction, and on June 19, 2002, APA filed the identical action in the U.S. District Court for the District of New Jersey under the current civil action number. Separately, on September 3, 2002, the Class sued ALPA and APA, and thereafter, upon answering APA's claims in the original action, also asserted various cross- and counterclaims against ALPA, APA, AA and TWA LLC. The District Court subsequently ordered a realignment of the parties into their current posture (*i.e.*, with the Class as plaintiffs, and APA, ALPA, AA and TWA LLC as defendants).

imminently and inevitably become the exclusive bargaining agent for Petitioners, as well, upon completion of the TWA-AA merger, and certification by the NMB.

The District Court dismissed Count II, and the Court of Appeals affirmed that dismissal, on the basis that no duty had been owed to the Class by APA prior to APA becoming the Class' certified representative. It is that determination which Petitioners herein respectfully submit was error, and of which review on certiorari is herein accordingly respectfully sought.

In affirming that part of the District Court's order, the Third Circuit relied largely upon a footnote in *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971), and characterized that footnote (no. 20) as this Court's holding on important questions concerning the outer limits of the duty of fair representation. It did so, though, notwithstanding *Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952), which had found a duty of fair representation to indeed be owing to certain railroad employees by a union which was *not* their bargaining representative. It also ignored *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 83, 110 S. Ct. 424, 434, 107 L. Ed. 2d 388, 406 (1989), almost two decades after *Allied Chemical*, which yet again suggested that non-members of a bargaining unit may be able to assert breach of the duty of fair representation claims against that unit's certified representative.

In the more than 33 years since *Allied Chemical*, some circuit and district courts, like the Third Circuit in the instant case, have treated its footnote 20 as a holding to which they were bound notwithstanding *Howard* (and later also *Breininger*), while others have limited, or even disregarded altogether, its potential controlling effect. Accordingly, with the working lives, and careers, of thousands of former pilots having already been affected in the instant case, and tens or

perhaps even hundreds of thousands more merely awaiting the next "mega-merger" to suffer a similar fate, it is respectfully submitted that the time has now come for this Court to state, once and for all, what the law indeed is in this area, and to clarify for the circuit and district courts the true limits of the fair representation duty.

STATEMENT OF FACTS

On January 9, 2001, American Airlines ("AA") agreed to purchase TWA's assets and hire TWA's pilots — the 2,337 men and women who comprise the Petitioners, and the plaintiff Class herein — conditioned upon Petitioners' agreement to delete the so-called "Allegheny-Mohawk Labor Protective Provisions" (the "LPPs") from their then-current collective bargaining agreement ("CBA") with TWA. (A603). The LPPs were important in that they provided a means for Petitioners to block the transaction, or require arbitration of issues concerning seniority integration, had Petitioners wished to do so.

At the time, Petitioners were represented by the Air Line Pilots Association ("ALPA") through its local arm, the TWA Master Executive Council ("MEC"). (A546). The AA pilots were, and at all times relevant herein have been, represented by another union, the Allied Pilots Association (the "APA").

On January 10, 2001, as contemplated by the TWA/AA Purchase Agreement, TWA filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (A270). On March 15, 2001, TWA filed a motion under Section 1113 thereof, seeking to abrogate the CBA because the MEC had refused to modify it by deleting the LPPs. (A682).

Shortly thereafter, ALPA agreed to delete the LPPs, and accepted a promise by AA to use AA's best efforts to secure a fair and equitable process for the integration of seniority, and to adopt the procedures that resulted from facilitated

(mediated) meetings between APA and ALPA. On April 6, 2001, the parties entered into a stipulation withdrawing the Section 1113 motion, and authorizing TWA to modify the CBA. (A681-83; A694; A698). Three (3) days later, the Bankruptcy Court approved the sale of TWA's assets. (A681).

On April 9, 2001, TWA LLC entered into a new collective bargaining agreement with ALPA (the "Transition Agreement"). That agreement was to remain in effect until: (a) the NMB adjudicated AA and TWA LLC to be a "single carrier"; and (b) APA's certification as the AA pilots' bargaining representative was formally extended to cover Petitioners, as well. (A691-92). The next day, April 10, Petitioners formally became employees of TWA LLC. (A551).

From February through August 2001, the APA and the MEC discussed seniority integration under the auspices of an AA-provided "facilitator," but were unable to reach an agreement. (A552). What Petitioners and their MEC did not know at the time, but subsequently learned, was that on July 10, 2001, while simultaneously supposedly "negotiating" in good faith with the MEC, APA had entered into a wholly separate integration agreement directly with AA. That agreement, in pertinent part, mandated that the seniority lists for the incumbent AA pilots and Petitioners, respectively, be combined pursuant to the CBA then in force between AA and APA. The incumbent AA pilots, but not Petitioners, moreover, were to be granted furlough protection. (A551-552). The "facilitated discussions" between APA and Petitioners (through their MEC) were thus shown to have been a plain and simple sham.

A few months later, in October 2001, AA's Director of Labor Relations, Jeff Brundage, advised the MEC that APA and AA would soon impose their seniority integration plan upon Petitioners. Brundage described this integration as a "shit sandwich" which Petitioners had no choice but to accept. (A450). Thereafter, on October 23, 2001, APA

informed the MEC that the seniority dates on the combined AA/TWA seniority list for all Petitioners would be April 10, 2001, the date the transaction between TWA and AA had closed. (A552-553). Among the effects of this decision was the elimination for Petitioners of any of the furlough protection APA had negotiated for the incumbent AA pilots back in July. (A552-553).

On November 8, 2001, APA and AA executed the seniority integration agreement now known as Supplement CC. By its terms, Supplement CC governed the seniority integration of Petitioners with the incumbent AA pilots, and controlled various other terms and conditions of Petitioners' employment both at TWA LLC, and thereafter at AA (once APA's certification was extended to cover Petitioners on April 3, 2002). (A324).

Of course, Petitioners had not only never agreed to Supplement CC's terms, they had never even been permitted to participate in the negotiation thereof, whether directly, through their MEC, or otherwise. To the contrary, APA had not merely effectively, but in fact, negotiated Supplement CC on their behalf. APA did so, moreover, not merely without ever informing Petitioners, but well before ever gaining formal representational authority over them, as well. (A551, ¶31). Accordingly, despite pressure to do so, the MEC refused to sign Supplement CC. That refusal, however, failed to prevent Supplement CC's implementation. (A450-451).

The very next day, November 9, 2001, APA filed a petition with the NMB to have AA and TWA LLC declared a "single carrier" for representational purposes, and to thus become the collective bargaining agent for both the incumbent AA pilots *and* Petitioners. (A60). On March 5, 2002, the NMB granted APA's petition. ALPA was given thirty (30) days to submit an application showing sufficient interest to

permit an election as to who should represent the combined AA/TWA LLC pilot group, but declined to do so. (A697; A436, ¶76).

Thereafter, on April 3, 2002, the NMB declared APA the exclusive bargaining agent for all of the AA and TWA LLC pilots, thereby terminating any representational rights on the part of ALPA. (A710). On that date, the Transition Agreement previously entered into between ALPA and TWA LLC effectively terminated, and Supplement CC took effect. (A326; A562; A685-86). Supplement CC's terms were thereupon imposed upon Petitioners. APA and AA ignored the "status quo" conditions under which Petitioners had worked for TWA LLC and, among other things, effectively "stapled" most of them to the bottom of the incumbent AA pilot seniority list. (A326, A467-68).

Between April 2001 and the NMB's designation of APA as Petitioners' exclusive bargaining agent on April 3, 2002, neither AA nor TWA LLC ever bargained with ALPA or the MEC — Petitioners' then-current certified representatives — over seniority integration. (A554). Rather, AA and TWA LLC simply realized that ALPA was effectively "done" as Petitioners' representative, since the nature of the transaction, and the coming integration, would imminently, and inevitably, result in APA replacing ALPA as Petitioners' representative under NMB rules.[3]

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[3] Additionally, throughout this period, ALPA and APA had been secretly planning to merge, the largest obstacle being the integration of Petitioners' seniority with that of the incumbent AA pilots. APA was adamant that it control the seniority issue to advantage its members. ALPA ceded to APA's demands because ALPA sought to acquire APA — its largest U.S. competitor — and APA's roughly $25,000,000 in annual dues. In addition to affirmatively harming Petitioners, therefore, APA was also conspiring with ALPA to deprive the Class of adequate representation and its seniority. (A465-467).

Implementation of Supplement CC has since had a devastating impact upon Petitioners. For example, on January 9, 2001, when the AA/TWA transaction was announced, there were 12,035 AA pilots and 2,337 TWA pilots. (A468). Thereafter, AA hired 304 *new* pilots. Indeed, AA hired 54 new pilots *on the very day* the transaction was finalized (April 9, 2001). Each of the new AA pilots was thereafter placed higher on the combined AA/TWA LLC seniority list than over 1,200 of the former TWA pilots, many if not most of whom had already provided years of service. Each of the 304 new AA pilots, and all 11,000 of the incumbent AA pilots also received furlough protection.

In contrast, since the TWA acquisition closed, most of the Petitioners have been laid off from their pilot jobs. (A468). Indeed, fully fifty-four percent (54%) of Petitioners were furloughed before even the most junior incumbent AA pilot was laid off. (A468-469). *None* of the TWA pilots, moreover, received any furlough protection — not even as much as those pilots newly hired by AA on the date the transaction closed. (A468).

In total, fewer than twenty-five percent (25%) of the former TWA pilots will keep their jobs notwithstanding the work — the flying — they brought with them when they came with TWA's routes, planes, landing slots and other assets to AA. (A468-69). If the determinations of the District Court and Third Circuit herein are allowed to stand, moreover, Petitioners, and all unionized workers whose employers are acquired hereafter, will effectively be left without any recourse or remedy for the losses of seniority, and of their careers, which they will have innocently and defenselessly suffered.

ARGUMENT

A TRILOGY OF SUPREME COURT DECISIONS LEAVES UNCLEAR WHEN, IF AT ALL, AN "OUTSIDER" MAY BRING A DUTY OF FAIR REPRESENTATION CASE

A union's duty of fair representation is often described as the corollary of the worker's surrender of his right to bargain individually, *see, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 83, 110 S. Ct. 424, 434, 107 L. Ed. 2d 388, 406 (1989); *Schneider Moving and Storage Company v. Robbins*, 466 U.S. 364, 376, 104 S. Ct. 1844, 1851, 80 L. Ed. 2d 366, 376 (1984); *Delcostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983); *Lewis v. Local Union No. 100, Laborers' Int'l Union of N. Am.*, 750 F.2d 1368, 1375-76 (7th Cir. 1984); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009, 91 S. Ct. 1253, 28 L. Ed. 2d 545 (1971).

Accordingly, the duty, judicially created in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204, 65 S. Ct. 226, 89 L. Ed. 173 (1944), is regarded as akin to a fiduciary duty, *see Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 74, 111 S. Ct. 1127, 1134, 113 L. Ed. 2d 51, 62 (1991); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567, 110 S. Ct. 1339, 1346, 108 L. Ed. 2d 519, 530 (1990); *Cruz v. Local Union Number 3, Int'l Brotherhood of Elec. Workers*, 34 F.3d 1148, 1153 (2d Cir. 1994). It serves as a "'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law,'" *see Breininger, supra*, 493 U.S. at 87-88, 110 S. Ct. at 436, 107 L. Ed. 2d at 409 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842, 853 (1967)), and is a necessary outgrowth of the fact that "national labor policy vested unions with power to order the relations of employees with

their employer," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181, 87 S. Ct. 2001, 2007, 18 L. Ed. 2d 1123, 1128 (1967).

This judicially-created doctrine has evolved,[4] but the major evolutionary trail has been forged largely by this Court.[5] This Court and the circuit courts have repeatedly recognized that a key inquiry is not merely the type of duty owed, but also the actual circumstances in which the duty is triggered.

This Court's pivotal role in creating and then shaping the duty of fair representation has, however, left largely unresolved the outer limits of the duty, particularly as it relates to those who are not members of the bargaining unit. As a result, the circuit courts have offered sharply divergent understandings as to this issue, and the district courts, in turn, have been left with little guidance.

In *Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952), plaintiffs were black "train porters" who for many years had been treated by the carrier and defendant as a separate class for purposes of representation, and had in fact been represented by another union of their own choosing. Since the defendant union in *Howard* had discriminated not against minority members of its own craft, but rather against those at least nominally of another,

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[4] *See, e.g., Carroll v. Brotherhood of Railroad Trainmen*, 417 F.2d 1025, 1027 (1st Cir. 1969) (DFR has been "expanded to embrace not only contract negotiations, but also the handling of individual grievances"); *President v. Illinois Bell Tel. Co.*, 865 F. Supp. 1279, 1290 (N.D. Ill. 1994) (unions have a "judicially evolved" duty of fair representation).

[5] *See, e.g., Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130, 113 L.Ed.2d 51, 58 (1991); *Breininger, supra*; *Vaca, supra*; *Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38, 73 S. Ct. 681, 685-86, 97 L. Ed. 1048 (1953).

it claimed it was not liable. The Court nevertheless found a breach of the union's "statutory duty," 343 U.S. at 773, 72 S. Ct. at 1025, 96 L. Ed. at 1288.

"Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions," the Court held, "must execute their trust without lawless invasions of the rights of other workers," 343 U.S. at 774-75, 72 S. Ct. at 1026, 96 L. Ed. at 1289. Those "other workers," the Court found, included even minority members of a then-separate craft, represented by a different bargaining agent.

Thereafter, in contrast, in *Allied Chemical & Alkali Workers of America, Local Union No. 1. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971), this Court observed, in a footnote, that retirees, as non-members of the bargaining unit, were *not* entitled to the bargaining agent's statutory duty of fair representation in negotiations with the employer, *see id.*, 404 U.S. at 182, n.20, 92 S. Ct. at 399, 30 L. Ed.2d at 359. The Court expressed uncertainty as to *Howard*'s "reach and rationale," but intoned that *Howard* "obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent."

The *Allied Chemical* footnote, however, obfuscated more than it clarified, even though it was apparently dictum. First, retirees, on the one hand, and those who imminently are too become members of the bargaining unit, on the other, are as distinct from one another as, say, the past and the future. This renders uncertain the application of *Allied Chemical* to such other types of workers outside the bargaining unit. Second, the judicial dispensation of agents from "affirmatively" representing (or taking into account the interests of) non-members

of the bargaining unit obscures whether such agents have, at the very least, a duty to refrain from acting in bad faith toward those other workers, or doing them intentional harm.[6]

A. Circuit Courts Have Not Arrived at a Single Understanding of *Howard*'s Continued Efficacy

Ironically perhaps, the Third Circuit, as but one example, had (at least until the instant case) interpreted the *Allied Chemical* footnote not as *Howard*'s death knell, but rather as a clear signal that this Court "plainly preserve[d]" *Howard* therein, *see Nedd v. United Mine Workers of America*, 556 F.2d 190, 200 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S. Ct. 727, 54 L. Ed. 2d 757 (1978). The *Allied Chemical* footnote may thus reasonably be read as "leaving open the door" as to whether the DFR bars bargaining that would affirmatively, and discriminatorily, harm those outside the bargaining unit. To be sure, such a limitation would be consistent with *Howard*, in which workers who were represented by one union were held nevertheless to be statutorily protected from invidious discrimination by another.

In any event, *Breininger*, *supra*, revitalized *Howard* in clearly applying the duty in a hiring hall context, 493 U.S. at 89, 110 S. Ct. at 438, 107 L. Ed. 2d at 410 ("[t]he union's assumption in the hiring hall of what respondent believes is an 'employer's' role in no way renders the duty of fair representation inapplicable").

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[6] There may well be a third distinction — that the limit recognized therein refers to representing the workers in negotiation with management. To be sure, not having to affirmatively represent a group's interests in negotiations with management is very different from actively seeking to harm that group. Such a construction would give weight to the Court's use of the word "affirmatively" in the *Allied Chemical* footnote. A rather simple tort analogy would be to the absence of a duty to assist a stranger in need of help, but the *presence* of one not to affirmatively harm him.

Breininger's reasoning was at least partly dependent upon the recognition that the duty of fair representation must be applied to prevent discrimination against "prospective" employees, *see id.*, and, in addition, impliedly rejected the Sixth Circuit's finding that "hiring hall referrals are not a function of union membership since referrals are available to nonmembers as well as members," 493 U.S. at 72, 110 S. Ct. at 430, 107 L. Ed. 2d at 400.[7]

The uncertainty of the applicability and continued efficacy of *Howard* is heightened by the conflict between the *Allied Chemical* footnote and the decision in *Breininger*, and is yet further exacerbated by the recognition in several circuits that the duty of fair representation may sometimes extend to those outside of the bargaining unit, while others insist that the duty does not extend beyond those for whom the union is certified agent.

It may be the case that *Allied Chemical* must be read restrictively, so as to apply only to those who are not, and will not again become, members of the bargaining unit. The rule gleaned from *Howard*, though, may also simply have evolved, such that it may be applied today to prospective employees, but not former employees.

In *Nedd*, *supra*, the Third Circuit — the same court in which the instant case was decided — observed that:

> Federal labor policy does not "necessarily" require the recognition of a duty of fair representation at all. But

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[7] In addition, the Court acknowledged, but did not explicitly decide, the anomaly of providing differing rights where a hiring hall includes "a few token nonmembers" in addition to the rank and file, 493 U.S. at 91, 110 S. Ct. at 438, 107 L. Ed. 2d at 411. If the *Allied Chemical* footnote was intended to quell reliance upon *Howard* with regard to the rights of those outside the bargaining unit, one might have expected *Breininger* to draw a line of demarcation between those who were, and those who were not, members of the bargaining unit. But it did not.

> federal common law implied from the statutory authority conferred upon collective bargaining representatives has recognized the need to place limitation upon the power of the recognized bargaining representative to injure minorities inside *and outside* the bargaining unit.

556 F.2d at 200 (emphasis added). Indeed, the Third Circuit, five years after *Nedd*, vacated a District Court's determination and specifically found that employment applicants were, and ought to be, treated as members of a bargaining unit, *see Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 87 (3d Cir. 1982).

Still more recently, a court within the Third Circuit recognized that "[a]uthority exists for the proposition that the union's duty of fair representation sometimes extends to persons not currently employed in the bargaining unit," *see Felice v. Sever*, 1992 U.S. Dist. LEXIS 8514 (W.D.Pa. 1992), *aff'd*, 985 F.2d 1221 (3d Cir.), *cert. denied*, 509 U.S. 923, 113 S. Ct. 3038, 125 L. Ed. 2d 725 (1993).

Similarly, in *Jones v. Trans World Airlines Inc.*, 495 F.2d 790, 796 (2d Cir. 1974), the Second Circuit deemed it "clear" that a union may act "in a manner so arbitrary or malicious vis-a-vis an *outside group* that it exceeds the limit imposed by the duty of fair representation" (emphasis added). *Jones* declared that the lower court accorded the duty of fair representation "too narrow a scope when it assumed that in no circumstance did the [union] have a duty not to discriminate against non-unit members," *id.*, at 797.

In the instant case, however, the Third Circuit ignored *Breininger* altogether, and, instead, based its determination on the *Allied Chemical* footnote, stating, "*Allied Chemical*

unequivocally held that the bargaining agent is under no statutory duty to represent those not members of the bargaining unit in negotiations with the employer," *see Bensel*, *supra*, 387 F.3d at 312.[8]

Perhaps the unsettled nature of the issue is best illustrated by the Sixth Circuit, which has seemingly been on *both* sides of the issue. It observed in *McTighe v. Mechanics Educational Society*, 772 F.2d 210 (6th Cir. 1985), for example, that since the plaintiff was not a member of the collective bargaining unit, the union owed him no duty of fair representation. However, six years later, in *Woolsey v. Avco Corp.*, 944 F.2d 313 (6th Cir. 1991), it distinguished *McTighe* and found that plaintiffs, former members of the bargaining unit who had since become supervisory employees, had a right under the collective bargaining agreement to return to their positions in the bargaining unit. The language of the collective bargaining agreement "establishes a legal right 'the invasion of which creates standing,'" *Woolsey* held, *id.*, at 317 (*quoting Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).[9]

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[8] Interestingly, the Third Circuit dismissed the relevance of *Howard* in another way as well: It declared that APA's "decision" to subordinate the seniority of the TWA pilots "was a bona fide economic decision," albeit without any discovery record upon which to base such an assertion.

[9] Subsequently, the Sixth Circuit considered *Howard*'s reach and concluded that it did not impose a "general requirement" that unions are barred from negotiating preferences for members of their own craft at the expense of nonmembers of the craft, and suggested that a union may forfeit that right if it acts in bad faith, *see Allen v. CSX Transportation*, 325 F.3d 768 (6th Cir. 2003). In holding that no duty of fair representation attached, the court noted that two separate crafts, trainmen and locomotive engineers, were involved, and that "a union would face a conflict of interest if it was required to represent not only the members of its own craft, but also certain interests of those belonging to another craft," *id.*, at 772.

The reliance on the *Allied Chemical* footnote herein, and by various other courts, highlights the need for this Court to clarify to what extent *Howard* survives *Allied Chemical* and, likewise, to what extent the *Allied Chemical* footnote survives *Breininger*. Today, more than a half century after *Howard* and more than three decades after *Allied Chemical*, it is time for this Court to finally clarify what *Allied Chemical*, *Howard* and *Breininger* mean, and what the limits of the duty of fair representation truly are.

Circuit courts have wrestled with the "conjecture"[10] that *Howard* seems necessarily to engender,[11] but frequently disregard the key tenet of *Howard*: that those harmed therein — to whom the duty was found owing — were *not* members of the particular bargaining unit. If *Howard* is therefore to have any meaning, that meaning must be made clear by this Court. If it is to remain good law, courts (as well as unions and employees) must be able to comprehend whether its meaning is confined to issues of race relations, or whether it applies to *all* "invidious" discrimination in which a union may engage. If the duty of fair representation has evolved beyond *Howard*, it would be particularly instructive if this Court would so state, and clarify how the *Allied Chemical* footnote may be reconciled with *Breininger*.

In the instant case, it was clear that Petitioners — the TWA LLC pilots who were still technically represented by ALPA until the time of the NMB's "single carrier" determination — would subsequently become members of APA,

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[10] The *Allied Chemical* footnote declared that "[t]he reach and rationale of *Howard* are a matter of some conjecture," *see* 404 U.S. at 182 n.20, 92 S. Ct. at 399, 30 L. Ed. 2d at 359.

[11] The Ninth Circuit appears to be the most activist in limiting the duty only to circumstances in which the plaintiff is formally a member of the bargaining unit, *see, e.g., McNamara-Blad v. Association of Professional Flight Attendants*, 275 F.3d 1165 (9th Cir. 2002); *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819 (9th Cir. 1985).

and thus had a right as sure as the plaintiffs in *Woolsey*. Petitioners thus contend that they, too, are entitled to the benefits of the duty — from APA -— and particularly in light of APA's affirmatively bad faith conduct toward them. Count II of the Complaint should accordingly be reinstated, and Petitioners should be permitted to pursue their claim for breach of the duty of fair representation against APA.

B. The "Hiring Hall Cases" Make Clear That the Duty of Fair Representation Already Extends Beyond the Borders of the Bargaining Unit

Issues associated with labor relations in general, and with the duty of fair representation in particular, have often arisen in the context of hiring halls, *see, e.g.*, *Breininger*, *supra*; *Local 357, Int'l Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 81 S. Ct. 835, 6 L. Ed. 2d 11 (1961).[12] Hiring hall cases are particularly instructive because hiring halls often deal not merely with those who are already members of a bargaining unit, but those who will or may one day be, as well.

In *Jacoby v. NLRB*, 325 F.3d 301, 308-09 (D.C. Cir. 2003), for example, the D.C. Circuit applied a "heightened duty" standard to such cases. It found that, if the union "administers the exclusive hiring hall arbitrarily or without reference to objective criteria," *see Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988), "and thereby affects the employment status of those it is expected to represent," it commits both an unfair labor practice and a violation of the duty of fair representation.

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[12] Indeed, in *Allied Chemical*, *supra*, the Court noted that the National Labor Relations Board "has held that applicants for employment and registrants at hiring halls — who have never been hired in the first place — as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act," *see* 404 U.S. at 168, 92 S. Ct. at 392, 30 L. Ed. 2d at 351.

Interestingly, Petitioners here may be analogized to hiring hall applicants inasmuch as, like hiring hall newcomers, they were virtually completely dependent upon the good faith of APA. APA was, and remains, a powerful union that had effectively assumed representational authority over them from ALPA and, to a substantial degree, the power and authority of their employer, AA, as well, particularly with regard to the critically important question of how their seniority would be integrated with the incumbent AA pilots.

APA was in a position to, and did, negotiate seniority integration both for the incumbent AA pilots *and* Petitioners. That it had not yet gained formal representational authority for Petitioners by the time it sold them out, though, merely allowed it to claim that no duty, and thus no liability, attached for the tremendous harm which it had deliberately inflicted.

C. Exceptions to the Certification Requirement Also Already Exist

Even courts that have clung to the most parochial construction of the duty of fair representation have recognized that there are certain circumstances warranting exceptions to the traditional analysis. The Second Circuit, for example, recognized an exception to the requirement that a union be certified as the plaintiff's exclusive bargaining agent before applying the duty in *Mui v. Union of Needletrades, Indus. & Textile Employees*, 2000 U.S. App. LEXIS 11581 (2d Cir. 2000) (quoting *Quarles v. Remington Arms Co.*, 848 F. Supp. 328 (D. Conn. 1994)). *See also Abilene Sheet Metal, Inc. v. N.L.R.B.*, 619 F.2d 332, 346-47 (5th Cir. 1980) (issue not whether union *should* represent certain workers' interests, but, rather, whether union is or is not certified representative).

Similarly, in *Chavez v. United Food & Comm'l Workers Int'l Union*, 779 F.2d 1353 (8th Cir. 1985), the Eighth Circuit rejected the union's defense that it would be contrary to law,

or bad policy, to hold it to a duty of fair representation where it had not yet actually been certified as collective bargaining agent:

> Whatever the merits of that position, it does not mean that a union may never be held to some duty of fair representation where a majority of employees have designated the union as their bargaining agent, the union has accepted that designation and has attempted to bargain on their behalf but has failed to represent them fairly in the process.

Id., at 1357. The lower court had found that estoppel applied, and the Eighth Circuit confirmed this finding, *see id.*

Yet another exception to the perceived prerequisite that one be a member of the bargaining unit to prosecute a DFR claim was noted by the First Circuit in *BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am.*, 132 F.3d 824 (1st Cir. 1997). There, the Court declared: "The fact that the plaintiffs were not members of the Union at the time the statements were made does not command a contrary conclusion for a union owes a duty of fair representation to nonmembers whom it has undertaken constructively to represent." *Id.*, at 833. These various cases yet further demonstrate that even standard duty of fair representation analysis must sometimes yield to the practicalities of particular cases and circumstances.

Likewise, in circumstances in which *no* statutory duty of fair representation has been found, courts have sometimes looked to a contract-based duty of fair representation, *see, e.g.*, *Schneider Moving and Storage Company*, *supra*, 466 U.S. at 376, 104 S. Ct. at 1851, 80 L. Ed. 2d at 376 (after finding no traditional duty of fair representation, Court noted that "petitioners have pointed to no evidence that suggests the parties intended to impose a *contractual* duty of fair representation on the union" (emphasis added)); *Kuhn v.*

Nat'l Ass'n of Letter Carriers, Branch 5, 528 F.2d 767, 771 (8th Cir. 1976) (after dismissing statutory DFR claim because plaintiff sued union that was not his exclusive bargaining agent, court reversed dismissal of claim sounding in state law-based contractual duty of fair representation).

D. Important Public Policy Reasons Compel An Expansive Interpretation of the Duty

Airline mergers have become "an increasingly common phenomenon in the airline industry," *Pyles v. United Airlines, Inc.*, 79 F.3d 1046, 1051 (11th Cir. 1996). *See Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495 (E.D.N.Y. 2004). Indeed, just since the year 2000, there have been at least forty-one (41) reported federal court decisions dealing with airline mergers, a sharp increase over the previous four years. "[A]s [mergers] increase, so will the need for uniformity in the treatment given to those for whom a transfer is negotiated," *Pyles*, *supra*, at 1051.

If the dominant labor union in each such merger is permitted the unfettered, and essentially unreviewable, right to treat egregiously those who will imminently and inevitably *become* members of the bargaining unit, the safe and friendly skies of the United States will become a place of undue tension. Not merely the tens of thousands of commercial pilots in America, but the hundreds of thousands of flight attendants, myriad other ground employees, and the flying public in general will all be imperiled.

Teamsters Freight Local No. 480, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 167 N.L.R.B. 920, 923, 66 L.R.R.M. 1232 (N.L.R.B. 1967), found it not "in and of itself unlawful" for a union to cause the employer to affect adversely an employee's status, but that "lawfulness will depend upon the union's motivation," and "unlawful motivation may be inferred from the arbitrariness, invidiousness, or irrelevance of the conduct in question."

In *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799, 800 (7th Cir. 1976), the Seventh Circuit held that "endtailing," for no other reason than to favor a larger, more powerful group over a smaller, weaker one, breached the duty of fair representation.[13]

In *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965), the court reviewed the placement at the bottom of the seniority list of certain employees after a merger, and deemed this to be "only a normal and natural incident of union representation." In the instant case, though, after years of flying, the most senior pilots of TWA — one of the true pioneers of aviation — were, at the specific behest of the APA, systematically placed beneath the most junior AA pilots hired, in some cases, only days or weeks earlier.

In contrast to *Whiting Milk*, therefore, the APA's actions here simply *cannot* be viewed as a "normal and natural incident of union representation," nor as conduct that escapes the reach of the duty of fair representation. To the contrary, liability simply may not be avoided, particularly where, as here, the bargaining agent had affirmatively and in bad faith acted to harm those who were imminently, and inevitably, to become its members.

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[13] Similarly, in *Woodlawn Farm Dairy Co., Div. of Dolly Madison Foods, Inc.*, 162 N.L.R.B. 48, 54, 63 L.R.R.M. 1495 (N.L.R.B. 1966), the employer was found to have engaged in unfair labor practices by maintaining within a collective bargaining agreement a provision that discriminated against employees of newly acquired branches or plants who were not members of the particular union, and "by discriminatorily refusing to dovetail the seniority of employees."

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their petition for review on certiorari be granted.

Respectfully submitted,

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APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3176

LEROY BENSEL, individually and as representative of a class consisting of former Trans World Airlines, Inc., pilots employed by TWA Airlines LLC as of April 2001,

Appellant

v.

ALLIED PILOTS ASSOCIATION;
TWA AIRLINES, LLC;
AIR LINE PILOTS ASSOCIATION;
AMERICAN AIRLINES, INC.

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 02-cv-02917)
District Judge: Hon. Joseph E. Irenas

Argued July 12, 2004

BEFORE: RENDELL, FISHER and VAN ANTWERPEN,
Circuit Judges

(Filed October 26, 2004)

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OPINION OF THE COURT

VAN ANTWERPEN, *Circuit Judge.*

In this appeal of summary judgment, Appellants challenge the order of the District Court which granted summary judgment as to all Defendants-Appellees and dismissed all counts of Appellants' Second Amended Restated Complaint. Plaintiffs-Appellants (the "Class") are a group of airline pilots formerly employed by Trans World Airlines, Inc. ("TWA"). The gravamen of the Class' complaints, which arise under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, concern the imposition of a seniority integration agreement resulting from American Airlines, Inc.'s ("American") purchase of TWA's assets and the hiring of the Class by American's subsidiary, TWA Airlines, LLC ("TWA-LLC"). For the reasons explicated below, we reverse-in-part and affirm-in-part the Order of the District Court, and remand to provide the Class and the Air Line Pilots Association ("ALPA") an opportunity to conduct discovery on the claims asserted in Count I of the Second Amended Restated Complaint.

I. Facts

As the material facts are generally not in dispute, the facts presented below are taken in large part verbatim from the District Court's opinion in this case. Additional facts are incorporated from the parties' submissions and appendices.

The Asset Purchase Agreement

After several years of failing to make a profit, on January 9, 2001, TWA entered into an agreement with Defendant-Appellee American whereby American agreed to purchase the majority of TWA's assets following TWA's filing for Chapter 11 bankruptcy protection. TWA made such a filing the following day, January 10, 2001. As a condition of the

purchase agreement, American agreed to hire almost all of TWA's unionized employees provided that certain labor protective provisions in their various contracts were eliminated.

One of those provisions concerned the right of TWA's pilots to bring to arbitration issues of seniority integration in the event of a purchase of TWA or merger of TWA with another airline. American indicated that it would not proceed with its purchase of TWA unless this labor protective provision, known as Allegheny-Mohawk rights, was eliminated. TWA's pilots were represented by Defendant-Appellee ALPA through its TWA Master Executive Council ("TWA MEC") unit.[1] Under American's collective bargaining agreement with its pilots, represented by Defendant-Appellee Allied Pilots Association ("APA"), the seniority of any new pilots who began working for American, as a result of an acquisition by American, would begin to accrue only at the moment that the pilots began working for American.

The Waiver Agreement

The TWA MEC resisted waiving its seniority protection provisions, and on March 15, 2001, TWA filed a motion under 11 U.S.C. § 1113 with the Bankruptcy Court seeking to abrogate the provisions in its collective bargaining agreement with ALPA. In response, on April 2, 2001, the TWA MEC passed a resolution waiving its seniority protection provisions in exchange for a letter from American in which American promised to "use its reasonable best efforts" with APA to "secure a fair and equitable process for the integration of seniority" and to adopt the procedures that result from facilitated meetings between APA and ALPA. Significantly, any seniority integration agreement reached between APA and ALPA was to be presented to American as a proposed modification of the collective bargaining

[1] Some members of the class of Plaintiffs in this case were also members of the TWA MEC.

agreement between American and APA. On April 6, 2001, the Bankruptcy Court entered a stipulation and order withdrawing the section 1113 motion and formalizing the waiver agreement.[2]

The ALPA/TWA-LLC Transition Agreement

On April 9, 2001, ALPA and the TWA MEC entered into a transition agreement with TWA-LLC. Upon completion of the asset purchase by American, TWA-LLC would become a wholly owned subsidiary of American. Under that transition agreement, the majority of the provisions of the collective bargaining agreement between ALPA and TWA would remain in effect until such time as the National Mediation Board ("NMB") adjudicated TWA-LLC and American as a "single carrier" and extended APA's certification to cover the TWA-LLC pilots (comprising the Class). The transition agreement incorporated by reference American's promise to use its reasonable best efforts to ensure a fair seniority integration process. In addition, ALPA would continue to remain the exclusive representative of the TWA-LLC pilots until the NMB made the appropriate declarations. The next day, on April 10, 2001, American's purchase of TWA's assets was finalized and TWA-LLC began operations as a separate air carrier. At that point, almost all TWA pilots became employees of TWA-LLC.

Seniority Integration Process

Between at least February and August of 2001, the TWA MEC and APA negotiated with each other over seniority integration under the auspices of a facilitator provided by American. No agreement was reached between the parties.

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[2] There is a great deal of uncertainty as to what the result might have been if American had gone through with its purchase of the TWA assets without ALPA waiving its seniority integration protections. Of course, it was precisely this uncertainty that most likely influenced American to request the waiver by ALPA.

On November 8, 2001, APA and American reached an independent agreement on seniority integration of the former TWA pilots, known as Supplement CC. Under Supplement CC, some TWA pilots did receive credit for their seniority, and certain captains and first officer positions were guaranteed for former TWA pilots at the remaining pilot base for TWA-LLC pilots, in St. Louis, Missouri. Supplement CC was not to become effective until the NMB declared American and TWA-LLC to be a single carrier and extended the APA's certification. TWA MEC refused to sign Supplement CC.

NMB Proceedings

On November 9, 2001, APA filed a petition with the NMB seeking the declaration of "single carrier" status. ALPA opposed this petition, but on March 5, 2002, the NMB declared that TWA-LLC and American were a "single carrier" for RLA purposes. On April 3, 2002, after ALPA declined to submit an application to become the bargaining representative for the combined pilot group, and despite the objection to APA certification submitted by TWA MEC, the NMB certified APA as the sole bargaining agent for all American pilots. As a result, the April 9, 2001 TWA-LLC/ALPA transition agreement expired (by its own terms), ALPA's certification as the collective bargaining agent for the TWA-LLC pilots terminated, and Supplement CC became effective.

Arbitration Proceedings

Following execution of Supplement CC, ALPA pursued a grievance against American and arbitrated before a System Board of Adjustment, alleging that American violated the promise it made to ALPA in the letter it wrote concurrently with the April 2, 2001 waiver agreement. The grievance alleged that American did not use its "reasonable best efforts" to protect the TWA-LLC pilots' seniority protections, as it

had agreed to do in its letter. Through the arbitration, ALPA sought the nullification of Supplement CC. The arbitrator, in a decision dated April 18, 2002, rejected the grievance and found for American.

Summary of Relevant Dates

For purposes of clarity, the dates mentioned in the foregoing discussion may be summarized as follows:

January 9, 2001:	TWA enters into Asset Purchase Agreement with American.
April 2, 2001:	TWA MEC passes a resolution waiving its seniority protection provisions in exchange for American's "reasonable best efforts" promise.
April 9, 2001:	ALPA and TWA MEC enter into transition agreement with TWA-LLC.
April 10, 2001:	American's purchase of TWA's assets finalized; TWA-LLC begins operations as a separate air carrier.
November 8, 2001:	American and APA execute Supplement CC, an agreement governing the seniority integration of the former TWA pilots. Supplement CC is subject to two conditions subsequent.
March 5, 2002:	NMB declares that American and TWA-LLC are a "single carrier" for RLA purposes.
April 3, 2002:	NMB certifies APA as the sole bargaining agent for all pilots, making Supplement CC effective; transition agreement between TWA-LLC and ALPA expires.

April 18, 2002:	Arbitrator rejects ALPA's allegation that American did not use its "reasonable best efforts" to protect the TWA-LLC pilots' seniority integration, as promised in its letter.
September 3, 2002:	Class action initiated by former TWA pilots.
January 27, 2003:	Class files Second Amended Restated Complaint.

Procedural Posture

On September 3, 2002, this class action was initiated by filing a complaint notwithstanding a prior action by APA. Pursuant to a series of consent orders agreed to by all parties, the parties were realigned in their present form. The Class filed a Second Amended Restated Complaint against the four Defendants on January 27, 2003. The District Court's order dismissing the original action preserved the original filing dates for statute of limitations purposes.

II. Jurisdiction

Appellate jurisdiction is proper pursuant to 28 U.S.C. § 1291. The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1367.

III. Standard of Review

All four Defendants filed motions to dismiss on all claims asserted against them. The District Court elected to treat these motions as summary judgment motions.[3]

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[3] Notwithstanding the District Court's characterization of Defendants' motions as motions for summary judgment, the District Court dismissed duty of representation claims asserted against ALPA for failure to state a claim. To the extent we treat ALPA's motion as a motion to dismiss, our review is plenary. *Felice v. Sever,* 985 F.2d 1221, 1226 (3d Cir.), *cert. denied,* 509 U.S. 923, 113 S.Ct. 3038, 125 L.Ed.2d 725 (1993). Plaintiffs-Appellants have noted in their brief that the District Court

This Court has plenary review of the District Court's decision to grant summary judgment. *See Blair v. Scott Specialty Gases,* 283 F.3d 595, 602-03 (3d Cir. 2002). We apply the same standard as used by the District Court. *Id.* A grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In reviewing the grant of summary judgment, we must affirm if the record evidence submitted by the non-movant 'is merely colorable or is not significantly probative.'" *See Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.,* 311 F.3d 226, 232 (3d Cir. 2002).

Under this standard of review, if there is a material issue of fact about when the statute of limitations period began to accrue, then the District Court's granting of summary judgment was improper.

IV. Analysis

Count I

Count I of the Second Amended Restated Complaint asserts against ALPA a series of breaches of its duty of fair representation under the RLA. The District Court found these claims to be time-barred, or alternatively, that they failed to state claims upon which relief could be granted. As explained below, however, it follows from application of the rays of hope doctrine that Appellants' claims did not accrue until April 18, 2002, the date the arbitrator of the System Board of Adjustment denied Appellants' challenge to American's execution of its "best efforts" promise, or at the earliest, April 3, 2002, the date Supplement CC became

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failed to address their Rule 56(b) affidavit and failed to grant a Rule 56(f) continuance. That issue, however, is not properly before us as Appellants did not base their appeal on that ruling.

effective. Because the Class filed its breach claims against ALPA within six months of both of these accrual dates, the claims were timely filed, and, if proven, state claims warranting relief. Accordingly, we reverse the District Court and remand to permit the parties to proceed with discovery and provide the Class an opportunity to further explore its breach claims.

A. Accrual of Claim

It is undisputed that the statute of limitations for a duty of fair representation claim against a union under the RLA is six months. *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1193-94 (3d Cir. 1984).

As a general matter, a duty of fair representation claim accrues and the six month limitations period commences when "the futility of further union appeals becomes apparent or should have become apparent." *Scott v. Local 863, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 725 F.2d 226, 229 (3d Cir. 1984). If, however, a union purports to continue to represent an employee in pursuing relief, the employee's duty of fair representation claim against the union will not accrue so long as the union proffers "rays of hope" that the union can "remedy the cause of the employee's dissatisfaction." *Childs v. Penn. Fed'n Brotherhood of Maintenance Way Employees,* 831 F.2d 429, 434 (3d Cir. 1987); *see also Whittle v. Local 641, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 56 F.3d 487, 490 (3d Cir. 1995); *Miklavic v. USAir, Inc.*, 21 F.3d 551 (3d Cir. 1994); *Vadino v. A. Valey Eng'rs,* 903 F.2d 253, 261 n. 11 (3d Cir. 1990). In this context, it is irrelevant if the employees were aware of or with reasonable diligence should have discovered the acts constituting the breach at any time before rays of hope were extinguished. *See Childs,* 831 F.2d at 436; *Miklavic,* 21 F.3d at 556.

Two significant policies underlie the view that, despite the employee's awareness of the union's breach or the futility of further union action, the statute of limitations does not accrue while the union continues to represent the employee and proffers rays of hope regarding the latter's claim. First,

> it is inefficient and unwise to compel an employee to sue his union in federal court while the union continues, in good faith, to pursue the employee's claims and attempts to remedy any past breach of its DFR. If the union can indeed remedy the cause of the employee's dissatisfaction, it should be allowed to do so, thus obviating the federal judicial involvement. *Childs,* 831 F.2d at 434. This policy is especially befitting in the context of labor disputes, where Congress has evidenced its desire to resolve disputes through arbitration. *Id.* Second, requiring an employee to sue the union within six months of discovering the union's breach puts the employee in an untenable position because "if he waits to sue the union he may lose the right to do so, but if he sues the union immediately he may antagonize the best possible champion of his cause." *Id.* at 435.

B. Application

Before applying the rays of hope doctrine to the instant scenario, we note that, contrary to the District Court's and ALPA's position, Supplement CC was not the inevitable outcome of the April 2001 waiver of Appellants' Allegheny-Mohawk provisions. In other words, despite waiving an important labor protective provision, rays of hope remained that, with appropriate continued representation by ALPA, a more propitious seniority agreement than Supplement CC could have been obtained for the Class. First, although concession of its Allegheny-Mohawk rights left the Class in an admittedly weak bargaining position, the Class received in exchange for its waiver American's promise to use its "reasonable best efforts" to ensure "a fair and equitable

process for the integration of seniority." ALPA brought to arbitration the issue of whether American adhered to its best efforts promise. A favorable outcome could have resulted in the invalidation of Supplement CC. Second, ALPA submitted an opposition to APA's application to the NMB for a declaration of single carrier status, and ALPA, through the TWA MEC, requested that the NMB stay extension of APA's representational certification pending an investigation into possible interference by American. Success in any of these endeavors would have prevented imposition of Supplement CC, as the single carrier determination and extension of certification were prerequisites to its enforcement. Third, had ALPA attempted to require American and TWA-LLC to negotiate with it the terms of the Class' seniority integration, or attempted to challenge certification of APA as the certified collective bargaining agent of the former TWA pilots as requested by the TWA MEC, or attempted to seek representational rights of the combined pilots before the NMB, or challenged Supplement CC directly, actions that ALPA failed to take in purported violation of its fair representation duty to the Class, a more favorable integration agreement could arguably have been implemented. Finally, because waiver of the contractual Allegheny-Mohawk provisions did not constitute a clear and unmistakable waiver of statutory bargaining rights under the RLA, *compare Gullickson v. Southwest Airlines Pilots' Ass'n,* 87 F.3d 1176 (10th Cir. 1996), Supplement CC was not the foregone conclusion of the Class' waiver. Rays of hope were not automatically extinguished by virtue of the Class' waiver of the Allegheny-Mohawk provisions. Indeed, Supplement CC itself did not endtail all of the former TWA pilots.

1. NMB Certification

Appellants argue that the statute of limitations began to run no sooner than April 3, 2002, when ALPA lost representational rights and when Supplement CC became binding and effective.

This Court has applied the rays of hope analysis in the absence of any arbitration proceeding. Our discussion of the doctrine makes obvious that its supporting principles are not inherently dependent on the presence of an arbitration proceeding. An arbitration proceeding is merely illustrative of one way in which a union can proffer rays of hope that it will obtain the relief the complaining employee desires in spite of a breach of its duty of fair representation. We have also applied the rays of hope doctrine to a union's attempted renegotiation of the terms of a collective bargaining agreement with the employer on behalf of its members. Although the alleged breach of the duty of fair representation occurred during these negotiations, we found that the employees' potential cause of action against the union did not accrue until the union was decertified, for only then "were the rays of hope extinguished." *Miklavic,* 21 F.3d at 556.

Although Supplement CC was executed on November 8, 2001, it was an agreement subject to conditions subsequent — namely, that the NMB would render a single carrier determination and designate APA as the certified collective bargaining agent for all pilots. As stated earlier, ALPA and TWA MEC formerly opposed these determinations before the NMB. Had any of these conditions subsequent failed to transpire, the transition agreement between TWA-LLC and ALPA would have remained in effect at least until renegotiation with ALPA, and further bargaining on the issue of seniority negotiation would have occurred. Thus, rays of hope remained at least until these conditions subsequent were

satisfied, rendering effective and binding Supplement CC, and ALPA lost representation rights as the Class' bargaining agent.

Rays of hope had to extend until at least April 3, 2002, when the NMB certified APA as the sole bargaining agent for all American pilots. As suit was filed on September 3, 2002, the action was timely. We do not rest solely upon the April 3, 2002 date because, as discussed below, we believe that rays of hope extended until April 18, 2002, when the adverse arbitration decision was rendered.

2. The Arbitration Proceeding

Where a union represents the employee in an arbitration proceeding and proffers rays of hope concerning the possibility of success in spite of its breach, this Court has held that the employee's cause of action does not accrue until the arbitration board denies the employee's claim. *Childs,* 831 F.2d at 436; *Whittle,* 56 F.3d at 490. Although forcing a plaintiff to delay pursuing a meritorious duty of fair representation claim during fruitless representation by the union until the arbitration or grievance board issues its final decision sacrifices the policy of avoiding futile administrative procedures, this Court has determined that this policy is outweighed by the important federal policies of deference to arbitration, avoidance of unnecessary lawsuits and certainty as to when the statute of limitations commences. *Childs,* 831 F.2d at 436 n. 3.

Pursuant to this approach, the Class' claims against ALPA accrued when the adverse arbitration decision was rendered on April 18, 2002. The instant action was filed on September 3, 2002, within six months of accrual.

In the instant case, ALPA pursued an arbitration against American on behalf of the former TWA pilots in an effort to establish that American did not fulfill its promise to use reasonable best efforts to ensure a fair seniority integration

process. In instituting the grievance, ALPA sought to prevent enforcement of Supplement CC. Thus, a successful arbitral outcome would have remedied and/or rendered moot ALPA's supposed breaches. Had Supplement CC been invalidated, ALPA could have pressed American and TWA-LLC to bargain directly with it concerning a seniority integration agreement for the Class. Furthermore, Supplement CC's abrogation would have rendered moot Appellants' assertions that ALPA violated its duty of fair representation through its failure to seek representational rights of the combined pilot group before the NMB, its failure to challenge certification of APA as the certified collective bargaining agent of the former TWA pilots as requested of them by the TWA-MEC, and its failure to take action to challenge Supplement CC.

ALPA's attempt to distinguish *Childs* and *Whittle* on the basis that the breaches of the duty of fair representation asserted against the unions in those cases involved the unions' conduct *during* the grievance proceeding or arbitration proceeding is unpersuasive. Although both cases arise in that posture, the reasoning espoused in *Childs* and *Whittle* justify its application to situations where the union breach occurs outside the context of the arbitration proceeding itself. Indeed, the instant suit represents such an example. While the breaches asserted against ALPA are unrelated to its conduct during the arbitration, a favorable arbitral outcome would have remedied those breaches, as described above. As such, the polices supporting our reasoning in *Childs* and *Whittle* — that unnecessary federal litigation should be avoided, that administrative procedures should be given "full play," and that an employee should be spared the "Hobson's choice between letting the statute of limitations run and antagonizing his best advocate" *Childs,* 831 F.2d at 436 — are unquestionably furthered here. Moreover, it is significant that this Court has applied the rays of hope analysis in the absence of any arbitration proceeding in *Miklavic.* Therefore, we refuse to adopt such a narrow interpretation of this

precedent when the policies founding them are undoubtedly furthered in circumstances that differ from those decisions' exact factual postures.

It is of no moment that the arbitration proceeding did not specifically challenge the April 2001 waiver agreement and was unrelated to any supposed coercion of TWA MEC by ALPA to forfeit the Allegheny-Mohawk provisions in violation of its fair representation duty. We recognize that Appellants must have realized the general implications of waiving the Allegheny-Mohawk provisions at the time they agreed to do so. It may be true that ALPA's continued representation of the Class through arbitration could not have ameliorated the Class' weak bargaining position occasioned by that waiver. Rays of hope nonetheless apply to ALPA's alleged conduct in the context of forcing this waiver upon the Class. The Class could not have appreciated or predicted the full ramifications of this waiver until at the earliest when Supplement CC became effective and binding. Again, Supplement CC was not the waiver's inescapable result. Moreover, and perhaps more significantly, forcing the Class to challenge ALPA within six months of the waiver would have placed the Class in the untenable position of antagonizing the union that continued to represent them in an effort to acquire the most advantageous seniority integration possible. This concern represents a fundamental basis of the rays of hope doctrine. There are good reasons for having a statute of limitations, and we emphasize that the rays of hope doctrine is not open-ended. The fact pattern may vary from case to case, but clearly there comes a point when a union can no longer be said to proffer rays of hope to an employee, and the rays of hope are extinguished.

Accordingly, we hold that Appellants' breach of the duty of fair representation claims against ALPA did not accrue until April 18, 2002.

We briefly address and dispose of ALPA's position. ALPA posits that the six-month statute of limitations on a duty of fair representation claim challenging a collectively bargained agreement begins to run immediately upon execution of that agreement. Relying primarily on *Local Lodge No. 1424 v. National Labor Relations Board,* 362 U.S. 411, 415-417, 80 S.Ct. 822 (1960), ALPA asserts that this rule bars a legal challenge to both the April 2, 2001 waiver agreement that was subsequently memorialized in the Stipulation and Order of the Bankruptcy Court on April 6, 2001, and all the additional duty of fair representation breaches alleged in the Second Amended Restated Complaint which ALPA contends were the inevitable result of the initial waiver, because those claims accrued no later than April 6, 2001. *Local Lodge* is distinguishable in a very important respect. It rejected the premise that a collective bargaining agreement that contains a union security clause valid on its face, but which was entered into when the union did not have majority status, gives rise to two independent unfair labor practices, one being the execution of the agreement, the other arising from its continued enforcement. Instead, the Supreme Court held that

> [w]here . . . [a] collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, *and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution,* an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, . . . permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section.

362 U.S. at 419 (emphasis added).

This reasoning applies to bar Appellants' claims in the instant suit only if one accepts the proposition that the limitations period associated with ALPA's initial breach accrued on April 6, 2001, and the subsequent alleged breaches are all "inescapably grounded," 362 U.S. at 422, in the initial breach. Because Supplement CC was not the inevitable result of the waiver agreement, as described in connection with our "rays of hope" analysis, and because the subsequent fair representation allegations constitute breaches independent of the initial waiver agreement, this argument is not compelling.

In any event, ALPA contends that any challenge brought regarding Supplement CC accrued no later than November 8, 2001, the date of its execution. Again, the cases relied upon by ALPA in support of this view are materially distinguishable. In each case, the union being sued was the union that entered into the challenged agreement. As such, the employees pressing duty of fair representation claims against the union were already *bound* by the agreement in issue at the time that agreement was either entered into or ratified. Those plaintiffs suffered a definitive injury upon the date of execution or ratification. *See United Indep. Flight Officers v. United Air Lines, Inc.*, 756 F.2d 1262 (7th Cir. 1985) (initial injury occurred when the union failed to reach an agreement with employer and a subsequent injury occurred when the agreement was signed); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100 (2d Cir.) (incoming flight attendants were already employed, members of the union, and thus bound as of the date offending agreement was ratified), *cert. denied,* 502 U.S. 910, 112 S.Ct. 305, 116 L.Ed.2d 248 (1991). Significantly, *Gvozdenovic* found that the statute of limitations ran *not* from when the agreement was entered into, but from when it was ratified (and presumably effective). 933 F.2d at 1106. In contrast, although Supplement CC was executed on November 8, 2001, it did not purport to bind the Class until its conditions subsequent were satisfied. This occurred on April 3, 2002, when the NMB certified APA as the

bargaining representative for the Class. Indeed, the actions that the Class asserts ALPA failed to pursue in violation of its duty of fair representation may have invalidated Supplement CC or prevented its application to the Class.

3. Relation Back

Given our determination that the Class' claims against ALPA accrued on April 18, 2002, Appellants' claims are timely filed. Appellants initiated a class action against ALPA on September 3, 2002, within the prescribed six-month limitations period. ALPA counters that, with the sole exception of allegedly coercing the Class into waiving the Allegheny-Mohawk provisions, the additional purported breaches of its fair representation duty are time-barred nonetheless because they were not alleged until the Class's Second Amended Restated Complaint, filed on January 27, 2003. This is approximately nine months following accrual of the Class's breach claims. As explained below, ALPA's argument is unavailing because the breach claims specifically enumerated in the Second Amended Restated Complaint relate back to Appellants' original Complaint pursuant to Fed.R.Civ.P. 15(c)(2).

Fed.R.Civ.P. 15(c) provides:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> . . . .
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

In accordance with the general theory of liberalized pleading in the federal system, Rule 15(c) is premised on the notion that a party is not entitled to the protection of

the statute of limitations based upon the later assertion by amendment of a claim or defense that arises out of the same conduct, transaction, or occurrence set forth in the timely filed original pleading. 6A Wright, Miller & Kane, *Federal Practice & Procedure* § 1496 (2d ed. 1990). Thus, amendments that restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct, transaction or occurrence in the preceding pleading fall within Rule 15(c). *See, e.g., Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 n. 29 (9th Cir.), *cert. denied,* 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983). In essence, application of Rule 15(c) involves a search for a common core of operative facts in the two pleadings. As such, the court looks to whether the opposing party has had fair notice of the general fact situation and legal theory upon which the amending party proceeds. *See, e.g., Michelsen v. Penney,* 135 F.2d 409, 416-17 (2d Cir. 1943) ("[T]he original complaint clearly gave defendant notice that he would be held for all acts of negligence. . . . [D]efendant was bound to realize that he would be held for every possible act of mismanagement."). It is clear that the Class' Second Amended Restated Complaint merely expounds upon and further details the factual scenario and breach claims that were roughly sketched in its original Complaint. The original Complaint outlines in broad terms the events surrounding the Asset Purchase Agreement, the waiver agreement, the best efforts promise, the facilitated discussions between ALPA and APA, the arbitration proceeding brought by ALPA, and the negotiation and implementation of Supplement CC. The Class' breach allegations focus on ALPA's coercive role in forcing the Class to waive its labor protective provisions, but further charge ALPA with breach generally. These allegations are painted with a broad brush, and can easily be read to encompass the more particularized

claims that appear in the Second Amended Restated Complaint. For example, the original Complaint broadly avers that Appellants' claims stem from ALPA's actions in causing the class to lose its seniority rights. By virtue of the series of events drafted in the original Complaint, ALPA was unquestionably on notice that it would be held liable for every possible breach of its fair representation duty occasioned by the outlined facts. The additional purported breaches particularized in the Second Amended Restated Complaint derive directly from the factual circumstances adumbrated in the original Complaint. This conclusion is buttressed by the lack of any resulting disadvantage or prejudice to ALPA, who by virtue of the original Complaint was undoubtedly aware of general fact situation and legal theory upon which the Class sought to hold it liable.

The breach claims which the Class asserted by amendment arose out of the same "conduct, transaction or occurrence set forth . . . in the original pleading," and therefore under Rule 15(c) of the Federal Rules of Civil Procedure the amendments relate back to the date of the original complaint. Consequently, Appellants' claims charging ALPA with breaches of its duty of fair representation are timely.

C. Failure to State a Claim

The District Court alternatively dismissed four of Appellants' breach of the duty of fair representation claims for failure to state claims upon which relief can be granted. For the following reasons, we reverse.

The District Court treated together Appellants' allegations that ALPA breached its duty of fair representation by failing to seek representational rights of the combined pilot group before the NMB, and by failing to challenge certification of APA as the collective bargaining agent for the combined pilot group before the NMB. In finding that these allegations failed to state a claim for relief, the District Court relied on

Dycus v. NLRB, 615 F.2d 820 (9th Cir. 1980). The Ninth Circuit's opinion in *Dycus,* which involved a discharged employee's petition for review of an order of the NLRB dismissing an unfair labor practice complaint issued against two union locals, concurred with the Board's statement that "Local 598's withdrawal as bargaining agent did not constitute a breach of the duty of fair representation." *Id.* at 826 n. 2. *Dycus*, however, does *not* stand for the proposition that a union's withdrawal as a bargaining agent *never* constitutes a breach of the duty of fair representation. The withdrawal must be done in good faith and for a proper purpose. "An exclusive bargaining agent may avoid its statutory duty to bargain on behalf of the unit it represents by unequivocally and in good faith disclaiming further interest in representing the unit. A disclaimer will not be given effect . . . if it is made for an improper purpose. . . ." *Id.* at 826 (internal citations omitted). Because Appellants aver that ALPA faced a conflict of interest in representing the former TWA pilots arising from an active organizing campaign to bring American pilots into ALPA with the knowledge and approval of APA, it is premature to dismiss these duty of fair representation claims at this time. If Appellants prove their allegations that ALPA failed to take specific actions on behalf of its members for an improper purpose or in bad faith, they may obtain relief for ALPA's breach of its fair representation duty.

Next, the District Court determined that ALPA's alleged failure to challenge Supplement CC following its approval on November 8, 2001 failed to state a claim for relief. Specifically, the District Court found there to be no duty of fair representation right of one union to challenge an agreement legally signed by another union and its employer. In other words, ALPA's decision not to file a futile challenge to Supplement CC cannot legally constitute a duty of fair representation breach. In *Air Line Pilots Ass'n v. UAL Corp.,* 874 F.2d 439 (7th Cir. 1989), United's pilots, represented by ALPA, brought a suit against United and United's machinists

union, complaining that United entered into a collective bargaining agreement with the machinists' union to change the pilots' terms of employment without bargaining over the change with the pilots. The Seventh Circuit held that the particular disputed provision in United's collective agreement with the machinists' union violated the Railway Labor Act. ALPA attempts to distinguish this case by noting that it did not involve an airline merger, and more importantly, that it did not address the issue of whether a carrier — American or TWA-LLC — must bargain with a union — in this case ALPA — that does not represent any of its employees. It is undisputed that in *UAL Corp.*, the machinists and pilots were all employees of United. This latter distinction, however, ignores the fact that Appellants became employees of TWA-LLC as of April 9, 2001, and TWA-LLC continued to exist as a wholly owned subsidiary of American. Supplement CC was not executed until November 8, 2001. As such, ALPA had the right under the RLA to negotiate with at least TWA-LLC until March 5, 2002, when the NMB rendered its single carrier determination, and thereafter with American until ALPA's representational rights were extinguished on April 3, 2002. Appellants thus state a viable claim.

For the foregoing reasons, we reverse the District Court's opinion on Count I of the Second Amended Restated Complaint and remand to permit the parties to engage in discovery. It is our belief that at this stage of the proceedings Plaintiffs should be given a fuller opportunity for discovery relating to Count I and permitted to ascertain if there is any factual support for their claims. At this point we ask "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds, Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). It may be that ALPA properly carried out its duty

of fair representation and there was nothing ALPA could realistically accomplish under difficult circumstances. But it is too early to decide this issue at this point.

Count II

A. Alleged Breaches of the Duty of Fair Representation by APA Prior to April 3, 2002

Count II of the Second Amended Restated Complaint asserts against APA a number of purported breaches of the duty of fair representation committed prior to April 3, 2002. The District Court found that the APA owed no duty of fair representation to the Class prior to April 3, 2002, and accordingly dismissed these claims. We agree with the District Court and affirm for the following reasons.

A union has the statutory duty to represent all members of the appropriate bargaining unit fairly. *See Humphrey v. Moore,* 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964). The scope of the duty of fair representation is commensurate with the scope of the union's statutory authority as the exclusive bargaining agent. Accordingly, a member of the bargaining unit has a cause of action against the union for breach of that duty. *Vaca v. Sipes,* 386 U.S. 171, 186, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Conversely, the union's statutory duty of fair representation does not extend to those persons who are not members of the pertinent bargaining unit. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 n. 20, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) (holding that because retirees are no longer members of the bargaining unit, the union has no duty to represent them in negotiations with the employer). In other words, exclusive representation is a necessary prerequisite to the statutory duty to represent fairly. *Sipes,* 386 U.S. at 177, 87 S.Ct. 903.

Recognizing the general principle that a labor union's statutory duty of fair representation extends only to the bargaining unit it exclusively represents, Appellants argue that when two employee groups are combined, the duty of fair representation arises from the inclusion or impending inclusion within the bargaining unit that the integration process seeks to create. The cases relied upon by Appellants, however, do not support this contention. With one exception that is not applicable in the present case, none of the cases cited by the Class stand for the proposition that a union's duty to a group of employees may attach before those employees formerly enter the pertinent bargaining unit. Instead, as explained below, the finding in each of these cases that the relevant union's purported unlawful actions implicated a duty of fair representation occurred in the context of plaintiffs-employees who were members of the pertinent bargaining unit at the time the union took the allegedly unlawful actions.

In *Brotherhood of R.R. Trainmen v. Howard,* 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952), the case illustrating the "exception" alluded to above, the Supreme Court held that a union may not use the powers accorded it under the law for the purposes of racial discrimination against employees who are not members of the bargaining unit represented by the union. The Supreme Court emphasized the narrowness and limited reach of this opinion in *Allied Chemical:* "But whatever its theory, [*Howard*] does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions on behalf of those whom it does represent." 404 U.S. at 181 n. 20. Indeed, *Allied Chemical* unequivocally held that the bargaining agent is under no statutory duty to represent those not members of the bargaining unit in negotiations with the employer. *Id. Jones v. Trans World Airlines, Inc.,* 495 F.2d 790 (2d Cir. 1974), involved two separate classes of Trans World Airlines employees —

guards and passenger relations agents — who performed many of the same functions. 495 F.2d at 793-94. Only the guards were represented by a union. *Id.* Relying on findings that the union "insist[ed] that the passenger relations agent jobs were in the guard unit" and that the passenger relations agents "had performed guard duties all along," the court held that the passenger relations agents were de facto members of the guard bargaining unit. *Id.* at 797. The Second Circuit thus concluded that the union breached its duty of fair representation by discriminating against the passenger relations agents based on their non-union status. *Id.* at 798. This Circuit has characterized *Jones* as "stand[ing] for the limited and undisputed proposition that discrimination against non-member employees *who are part of the bargaining unit* is impermissibly arbitrary if no relevant distinctions exist between the union and non-union employees." *Deboles v. Trans World Airlines, Inc.,* 552 F.2d 1005 (3d Cir. 1977) (emphasis added). Similarly, in *Gvozdenovic v. United Air Lines, Inc.,* 933 F.2d 1100 (2d Cir.), *cert. denied,* 502 U.S. 910, 112 S.Ct. 305, 116 L.Ed.2d 248 (1991), "as of the date" the AFA [the union representing the incumbent flight attendants at United] "ratified the allegedly violative [seniority] agreement," "the 1,202 incoming flight attendants [from Pan American] already had been working for United," were already members of the AFA, and thus were part of the United bargaining unit to which the AFA owed the duty of fair representation. 933 F.2d at 1106. *Bernard v. Air Line Pilots Ass'n,* 873 F.2d 213 (9th Cir. 1989) concerned the merger of Jet America and Alaska Airlines. Prior to the merger, Alaska pilots were represented by ALPA, while Jet America pilots were unrepresented. Alaska Air Group, the acquiring corporate parent of Alaska Airlines, operated Jet America and Alaska separately for several months, then announced it would merge the carriers. ALPA negotiated with Alaska regarding integration of the Jet America pilots with the Alaska pilots for purposes of seniority. Despite repeated requests, Jet America

pilots were prohibited from partaking in the seniority discussions both prior to and following the effective date of merger on October 1, 1987. An agreement between ALPA and Alaska was not reached until October 6, 1987. In affirming the district court's finding that ALPA breached of its duty of fair representation as to the Jet America pilots, the Ninth Circuit noted that there was no dispute that the non-union Jet America pilots had entered the Alaska pilots' bargaining unit prior to October 6, 1987, the date the agreement adversely affecting plaintiffs' seniority rights was reached between ALPA and Alaska. 873 F.2d at 216.

The parallels between this case and that confronting the Ninth Circuit in *McNamara-Blad v. Ass'n of Professional Flight Attendants,* 275 F.3d 1165 (9th Cir. 2002) are striking. In late 1998, American purchased 80% of Reno's outstanding shares and announced it would merge the operations of the two airlines. Prior to merger of the flight operations on August 31, 1999, APFA, the union representing American's flight attendants (the Reno flight attendants were represented by another union), reached a seniority integration agreement with American. This agreement endtailed all Reno flight attendants, and was implemented as of August 31, 1999. In affirming the district court's finding that, as a matter of law, the Reno flight attendants were not in the APFA's bargaining unit and thus that the APFA was not required to fairly represent them, the Ninth Circuit explained that "[t]he workforces of the two merging carrier become a single bargaining unit only when the carriers become a 'single carrier' . . . American and Reno did not become a 'single carrier' for representational purposes until August 31, 1999, after the seniority agreement between the APFA and American was reached." 275 F.3d at 1170 (internal citations omitted). The analogies between *McNamara-Blad* and the instant case are obvious.

Contrary to the Class' assertion, the cases discussed above indicate that it is *actual* inclusion in the bargaining unit — not "impending" inclusion — that triggers attachment of the duty of fair representation. To the extent *Howard,* as clarified by *Allied Chemical* is an exception to this rule, it not implicated here because the APA's decision to subordinate the seniority of most TWA-LLC pilots was a bona fide economic decision made to protect the interests of American's pilots, for whom APA did have a statutory duty to fairly represent. Before the NMB consolidated the TWA-LLC pilots into the American bargaining unit on April 3, 2002, when it certified APA as the exclusive bargaining agent, the pilots at American and the pilots at TWA-LLC belonged to different bargaining units, each with its own exclusive bargaining representative. It is only subsequent to April 3, 2002 that APA held a statutory duty to the Class.

This outcome is supported from a policy perspective. Appellants contend that following the reasoning espoused in *McNamara-Blad* will enable unions to conspire and time events in a manner designed to avoid duties of fair representation that would otherwise be owed to a group. In this case, had the Class become employed by American (as opposed to TWA-LLC) following closing of the merger, APA would most probably have been the exclusive bargaining agent for both the Class and American's pilots and would have owed a statutory duty to both groups in negotiating seniority. To avoid a statutory duty to fairly represent the Class, Appellants aver that APA and American created the fiction that the two groups of pilots were employed by different entities (American and TWA-LLC) and that the Class was not part of the APA bargaining unit. This fiction enabled APA to unilaterally negotiate the Class' seniority with American without the Class' input. Appellants allege that Supplement CC was intentionally entered into by APA and American prior to APA's petition to extend its certification to cover the Class to avoid the consequences of

Bernard. Nevertheless, we agree with APA that the Class' allegations that ALPA breached its duties and conspired with APA to deprive the Class of valuable rights does not justify imposition of a fair representation duty on APA prior to April 3, 2002.

Appellants' conspiracy concerns, while legitimate, run counter to an important competing policy articulated in *McNamara-Blad.* Adopting Appellants' position "would force unions to protect the interests of any person who might become a bargaining unit member to the detriment of current bargaining unit members. Such a duty would contravene the union's statutory duty to protect the interests of its own bargaining unit members." 275 F.3d at 1173. In light of the fact that Appellants do have a remedy against their former bargaining agent, ALPA, this observation outweighs Appellants' concerns regarding possible collusion and conspiracy.

Because we agree with the District Court that APA owed no duty of fair representation to the Class prior to April 3, 2002, we affirm.

B. Alleged Breaches of the Duty of Fair Representation by APA Post-April 3, 2002

Count II of the Second Amended Restated Complaint further asserts that APA breached its duty of fair representation to the Class after April 3, 2002 by failing to require American to maintain the status quo as to the Class' working conditions, including seniority. In lieu of maintaining the status quo, Appellants allege that Supplement CC was imposed without following the requisite section 6 procedures of the RLA, 45 U.S.C. § 156. The District Court dismissed the allegations for failure to state breaches of the duty of fair representation, either because the allegations are "too general in nature to specify any actual DFR breach" or because there

was nothing for APA to negotiate on behalf of the Class once Supplement CC became effective. For the following reasons, we affirm.

The "status quo" provision of section 6 of the RLA directs that, while the major dispute resolution procedures are being followed, "rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by [the RLA]. . . ." 45 U.S.C. § 156; *see also id.* § 152, Seventh ("No carrier . . . shall change the rates of pay, rules, or working conditions of its employees . . . except in the manner prescribed in [collective bargaining] agreements or in section 156 of this title."). The purpose of the status quo provisions is to impose an obligation on the parties to make every reasonable effort to negotiate a settlement. The provisions promote compromise to avoid strikes. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union,* 396 U.S. 142, 148-49, 149 n. 14, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). With respect to ascertaining what the appropriate status quo conditions are, the Supreme Court has counseled that "the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Id.* at 153. As such, it is of no moment if the relevant collective bargaining agreement upon which the dispute is based has expired. Because the status quo derives from the RLA, and not contract, that agreement can still be used to inform the court's status quo determination. "[T]he inquiry is not one which looks to the parties' collective bargaining agreements; instead, the act requires an objective determination of the actual status quo." *Int'l Ass'n of Machinists and Aerospace Workers v. Aloha Airlines, Inc.,* 776 F.2d 812, 816 (9th Cir. 1985). Moreover, that the focus of the status quo inquiry is on "actual, objective working conditions" does not preclude the parties from entering into an explicit agreement defining the specific conditions that the parties want to constitute the status quo during the

appropriate renegotiation period, even if such conditions differ from the actual, objective status quo. In other words, section 6 of the RLA does not prevent the parties from altering the actual, objective status quo by agreement. *Airline Pilots Ass'n, Int'l v. Pan-Am. World Airways, Inc.*, 765 F.2d 377, 381 (2d Cir. 1985).

Appellants argue that the terms and conditions embodied in the TWA-LLC/ALPA transition agreement, which expired by its own terms on April 3, 2002 when the NMB extended APA's certification to cover the Class, constitute the status quo and should have continued in full force until the APA negotiated new terms with American, with the exception of those limited terms which the parties had previously agreed would change. The transition agreement does not provide that the Class would be bound to any agreement entered into between American and APA upon determination of single carrier status and the transition agreement's expiration.

We agree that the Class never waived its statutory rights under the RLA. Section 6 of the RLA is not implicated, however, because imposition of Supplement CC upon on the Class on April 3, 2002 did not constitute a change in the Class' status quo. The facilitation agreement, signed by ALPA, APA, TWA-LLC and American, provides that, "in the event that APA and ALPA reach an agreement on an integrated seniority list . . . such agreement will be presented to American as a proposed modification of Section 13 of the collective bargaining agreement between American and APA." In essence, the status quo became a right to a particular process and whatever result it yielded. The facilitation agreement did not explicitly detail what would occur in the event the two unions failed to reach an agreement. Implicit in its arrangement, however, is that the Class would be bound by the terms of the American-APA collective bargaining agreement as those terms existed at the time the NMB extended APA's certification as the bargaining representative

for the entire Class, whether or not such terms had been modified by an agreement struck between APA and ALPA. As such, Supplement CC provided the status quo terms for the Class. This status quo determination is not, as Appellants argue, akin to finding a waiver of statutory rights. Instead, it illustrates that the Class' statutory rights were not in issue because there was no modification of the status quo. Pursuant to the facilitation agreement, the Class consented to be bound by the APA-American collective bargaining agreement, including Supplement CC, upon the appropriate declarations by the NMB.

Consideration of the terms of the expired transition agreement does not alter the analysis. With respect to the issue of seniority, the transition agreement did no more than rank the former TWA pilots vis-a-vis themselves. Indeed, it intentionally excluded any reference as to what sort of seniority agreement would ensue upon a determination by the NMB that TWA-LLC and American constituted a single employer.

While no case is directly on point, *Ass'n of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432 (D.C. Cir. 1994) lends support to this position. In *AFA*, USAir had assumed managerial control over Shuttle's flight operations. The USAir pilots were represented by AFA, and the Shuttle pilots were represented by TWU. After the NMB declared USAir and Shuttle to be a single transportation system, extinguished TWU's certification, and certified AFA as the bargaining representative for both Shuttle and USAir flight attendants, USAir insisted that the Shuttle employees were still covered by the terms of the Eastern-TWU agreement until a new agreement is negotiated. AFA then filed suit against USAir, contending that the AFA-USAir agreement necessarily establishes the terms and conditions to be applied to Shuttle flight attendants until a new agreement is negotiated. The D.C. Circuit held that the Eastern-TWU agreement fixed the status quo in the bargaining relationship between USAir and

AFA on behalf of Shuttle flight attendants. Consequently, the terms of that agreement govern the working conditions of Shuttle flight attendants until USAir and AFA agree otherwise. The Circuit defined the issue as follows: "whether, as a matter of law, the Board's termination of TWU's certification simultaneously caused the 'status quo' for Shuttle flight attendants to be changed so as to be defined by the terms in the AFA-USAir agreement rather than in the Eastern-TWU agreement." In answering this in the negative, the court made several observations pertinent to our inquiry. The court pointed out that the AFA-USAir agreement did not *mandate* that its coverage be extended to new units of flight attendants. Significantly, the court states that "there is no doubt that AFA and USAir could have included some such clause in their agreement to cover new units or groups of flight attendants added to the USAir transportation system." This observation implies that an incoming group would be bound by such a clause despite not being provided any opportunity to bargain over the clause. In the case at bar, the American/APA collective bargaining agreement, as supplemented by Supplement CC, did contemplate inclusion of Appellants. American and APA had in fact agreed upon the terms, including the seniority terms, that would govern the combined pilot bargaining unit when the NMB issued a single employer determination and extended the APA's representational certification to cover the combined unit. The D.C. Circuit's observations here are admittedly dicta, but lend support to the view that the status quo provisions of the RLA are not implicated in this case. As such, Appellants' claim that APA breached its duty of fair representation after April 3, 2002 by failing to enforce the Class' status quo is without merit.

Accordingly, we affirm the District Court's decision on Count II of the Second Amended Restated Complaint.

Counts III & IV

Count III of Appellants' Second Amended Restated Complaint charges American and TWA-LLC with breach of the duty to treat with the Class' certified representative pursuant to 45 U.S.C. § 152, Ninth. Count IV avers that American and TWA-LLC each failed to negotiate in good faith, pursuant to 45 U.S.C. § 152, First.[4] Appellees claim that only a certified representative would have a right to bring a cause of action under 45 U.S.C. § 152, First & Ninth. The Class advances two theories in asserting its right to bring a cause of action under these provisions. First, the Class argues that an implied right of action against American and TWA-LLC is created in its favor by 45 U.S.C. § 152, Second & Ninth. Second, the Class contends that its claims against American and TWA-LLC are properly brought as the "hybrid" claims pursuant to *Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees,* 831 F.2d 429 (3d Cir. 1987). The District Court found that 45 U.S.C. § 152, Second & Ninth do not create an implied right of action in favor of the Class and that the Class had no standing to bring Counts III and IV against American and TWA-LLC. We affirm the District Court's dismissal on these grounds.[5]

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[4] Although the RLA does not state an express duty to negotiate in good faith, this duty is implied throughout section 152. While Appellants' Second Amended Restated Complaint cites to section 152, First & Ninth, a duty to negotiate in good faith is more clearly implicated in section 152, Second ("[a]ll disputes . . . shall be considered, and, if possible, decided . . . in conference between representatives designated"). As explained in the text, however, none of these provisions provide a private cause of action for Appellants.

[5] Our disposition of Counts III and IV obviates the need to consider, as argued by American and TWA-LLC, whether Appellants' claims fail to state claims for relief or pose a representational dispute subject to the exclusive jurisdiction of the NMB.

The RLA does not expressly grant a private right of action to enforce its provisions. Although the legislative history of the RLA is silent on the issue of whether Congress intended to imply a private right of action under the RLA, *see Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930), "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mort. Advisors, Inc. v. Lewis,* 444 U.S. 11, 17, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). An intent to imply a private remedy may lie implicitly in the language or structure of a statute. *Id.* The Supreme Court has promulgated factors for determining whether a private remedy is implicit in a statute not expressly providing one. *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

Courts have found private rights under other provisions of 45 U.S.C. § 152. Applying the *Cort v. Ash* factors, many courts have implied a private right of action for individual employees within 45 U.S.C. § 152, Third & Fourth of the RLA. *See, e.g., Roscello v. Southwest Airlines Co.,* 726 F.2d 217, 220 (5th Cir. 1984); *Adams v. Fed. Express Corp.,* 547 F.2d 319, 321 (6th Cir. 1976), *cert. denied,* 431 U.S. 915, 97 S.Ct. 2177, 53 L.Ed.2d 225 (1977); *Beckett v. Atlas Air, Inc.,* No. 95-0480, 1995 WL 498703 (E.D.N.Y. Aug. 14, 1995); *Int'l Ass'n of Machinists and Aerospace Workers v. Altair Airlines, Inc.,* 481 F.Supp. 1359, 1360 (E.D. Pa. 1979). Implying a private cause of action for individual employees under 45 U.S.C. § 152, Third & Fourth of the RLA is appropriate given that those sections prohibit carriers from discriminating against *employees* in connection with union organizing activities. *See Int'l Ass'n of Machinists v. Northwest Airlines,* 673 F.2d 700, 707 (3d Cir. 1982). In *Adams,* however, the Sixth Circuit held that "the Railway Labor Act confers no implied right of action upon an *uncertified union* to maintain a suit on behalf of employees it seeks to represent." *Adams,* 547 F.2d at 322 (emphasis added).

Furthermore, research has not revealed any cases where the federal courts have allowed individual employees to pursue RLA statutory claims outside of 45 U.S.C. § 152, Third & Fourth, except for duty of fair representation suits against a union.

In contrast to 45 U.S.C. § 152, Third & Fourth, 45 U.S.C. § 152, Ninth & Second does not create a private right of action for individual employees. In determining whether Appellants have an implied right of action under 45 U.S.C. § 152, Ninth & Second of the RLA, we must employ the four factors set forth in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), specifically focusing on the first two factors: (1) whether plaintiff is a member of the class "for whose especial benefit the statute was enacted"; and (2) whether there is evidence of legislative intent to create or preclude the relief sought. *Id.* at 78; *see Touche Ross & Co. v. Redington,* 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). Unlike 45 U.S.C. § 152, Third & Fourth, which are directed specifically at the employer's relationship with *employees,* 45 U.S.C. § 152, Ninth & Second are directed at the employer's relationship with the certified *representative.* 45 U.S.C. § 152, Ninth of the RLA provides that the NMB shall resolve "disputes as to who are the representatives of the employees designated and authorized in accordance with the requirements of this Chapter" and to certify a designated union as bargaining agent. 45 U.S.C. § 152, Ninth. It provides further that "upon receipt of such certification the carrier shall treat with the *representative* so certified as the representative of the craft or class for the purposes of this Chapter." § 152, Ninth (emphasis added). 45 U.S.C. § 152, Second of the RLA similarly provides that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between *representatives designated* and authorized so to confer, . . ." § 152, Second (emphasis added).

We agree with the District Court that Appellants "are not within the definition of the class that the statute was designed to protect" because "[t]he statute does not state that the carrier must 'treat' with its employees, but rather with their representative." That the statute may indicate a congressional intent to create a private cause of action for a duly certified representative that is injured pursuant to these provisions does not imply that Congress intended to create a private right of action for any group or groups of individual employees claiming to act on behalf of the relevant employees. *Cf. Adams.*

A number of additional factors militate against granting individual employees a right to assert claims under 45 U.S.C. § 152, Second & Ninth. Allowing a group or groups of individual employees to bring a cause of action under section 152, Second or section 152, Ninth of the RLA would undermine the provisions' purpose of providing for an organized process of negotiation between one employee representative and the employer, and could lead to chaos. A bargaining agent, as opposed to any of its individual members, is in the best position to bring forth these types of grievances because a union is required to act in the best interests of *all* its principals. Moreover, and importantly, individual employees claiming to be aggrieved by the failure to treat or the failure to negotiate in good faith already have a remedy — individual employees may press a duty of fair representation claim against the appropriate representative(s), as was done by Appellants in this case, or the certified representative may bring a suit against the carrier. Pursuant to this analysis, Appellants as a class lack an implied private right of action to bring claims asserting breaches of the duty to bargain and duty to negotiate in good faith against American and TWA-LLC because they are not and have never been a certified representative of the TWA pilots.

The District Court did not address the Class' second theory in support of federal standing in Counts III and IV — that it could bring a "hybrid" claim under *Childs* against American and TWA-LLC.

In *Childs,* 831 F.2d 429, a railroad employee brought suit in federal court charging his union with a breach of its duty of fair representation, and also charging his employer with a breach of the collective bargaining agreement. Even though the claim against the employer constitutes a "minor dispute" within the exclusive jurisdiction of the NRAB, 45 U.S.C. § 153, we held that an employee may bring this claim against his employer in federal court. We held this because it was alleged that the employee could not obtain meaningful relief before the Board against the employer because the union's breach of its duty of fair representation had precluded the employee from presenting crucial evidence to the Board. We stated that "[o]ne important policy of the RLA . . . is to afford employees means for relief. Therefore, courts have formulated exceptions to the jurisdictional scheme of the RLA where it appears that without such access to the federal courts the employee's right to redress would be jeopardized." 831 F.2d at 437. Thus, even though an employee would normally have to arbitrate a minor dispute before the Board, the employee was permitted to proceed in federal court because he could not obtain meaningful relief before the Board.

Childs does not apply in this case. To begin with, we expressly stated in *Childs* that we were addressing "the rare case in which the union, by breaching its DFR, effectively precludes the employee's opportunity for obtaining relief before the NRAB." 831 F.2d at 441. Unlike *Childs,* the Class in the instant suit has not alleged that American and/or TWA-LLC breached a collective bargaining agreement. *Childs* also involved an employee's loss of an express statutory right, whereas only an implied right was claimed by the Class in the present case. Moreover, the stated goal of *Childs* was

carrying out the RLA's central policy of affording employees some fair and efficient means of redressing their grievances. This is not the situation in the present case. If a union breaches its duty of fair representation by failing to require a carrier to treat with it, as required by section 152, Ninth of the RLA, an individual employee's remedy lies in a duty of fair representation action against the union, not a major dispute claim against the carrier. As noted, Appellants may proceed against ALPA in this case.

Because we hold that Appellants may not pursue the claims averred in Counts III and IV, the District Court's dismissal of these claims is affirmed.

Counts V–IX

In Counts V through IX of their Second Amended Restated Complaint, Appellants allege state-law violations by Appellees, which they plead in the alternative to their federal claims. Counts V and VI allege that American, TWA-LLC, and APA engaged in tortious and malicious interference and fraudulent misrepresentation with respect to the collective bargaining agreement between ALPA and TWA. Appellants claim that as a result of the alleged interference and misrepresentations, ALPA agreed to the waiver agreement to Appellants' detriment and breached its duty of fair representation. Appellants proceed to claim in Counts VII and VIII that American and TWA-LLC breached the transition agreement by failing to use their best efforts to secure a fair and equitable process for seniority integration. APA allegedly tortiously interfered with American and TWA-LLC's contractual obligations under the transition agreement by causing them to breach. Finally, Count IX alleges that American, TWA-LLC, APA, and ALPA conspired with the common design of abrogating the TWA seniority integration provisions and endtailing the vast majority of TWA pilots in favor of the incumbent American pilots. The District Court dismissed Counts V though IX as preempted by the RLA.

Appellants argue that the District Court erred in dismissing their state-law claims against APA, American, and TWA-LLC. The District Court's decision relied on the preemption doctrine established in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), which was extended to the RLA in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). Under *Garmon,* state-law causes of action are presumptively preempted where they concern conduct that is actually or arguably either protected or prohibited by federal labor relations law. *Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n,* 90 F.3d 797, 801 (3d Cir. 1996). The two explicit exceptions to this preemption apply to conduct "deeply rooted in local feeling and responsibility" and to matters of only "peripheral concern" to federal labor relations law. *Garmon,* 359 U.S. at 243-44. Despite the generally sweeping nature of *Garmon* preemption, the Supreme Court has recognized judicial responsibility to "determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25,* 430 U.S. 290, 297, 97 S.Ct. 1056, 1062, 51 L.Ed.2d 338 (1977).

A principal purpose of the RLA is to provide for the prompt and orderly settlement of all disputes over pay, rules, or working conditions and the interpretation and application of agreements concerning pay, rules, or working conditions. RLA § 2, 45 U.S.C. § 151a. Appellants' state-law claims all involve alleged interference with their employment rights as established by the various agreements that govern their wages and other benefits as well as their right to be fairly represented under RLA § 2, 45 U.S.C. § 152. Thus the property rights at issue are founded upon federal law, derive their strength and protection from federal law, and exist

to effectuate a nationwide federal labor policy. *See Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre, Local 120,* 647 F.2d 372, 380-81 (3d Cir. 1981).

Having determined that Appellants' contractual rights are protected by federal labor law, which satisfies the presumptive preemption of *Garmon,* we now consider whether any exception to this presumption applies. The state-law claims alleged seek to protect Appellants' rights as established through their collectively-bargained agreements. Thus they do not concern conduct touching interests deeply rooted in local feeling and responsibility. *See Wilkes-Barre,* 647 F.2d at 381 (holding that tortious interference with a labor contract is not conduct touching interests deeply rooted in local feeling and responsibility). Nor is this a matter of only peripheral concern to federal law. Clearly, the process of seniority integration in the event of an acquisition directly affects the wages and other benefits of workers. The RLA determines the rights, obligations, and duties of employees, their representatives, and carriers with respect to negotiations and agreements concerning such a central aspect of employment. Thus, federal law is directly concerned with the issues here.

Appellants argue that with respect to their claims against APA, there can be no preemption of state-law claims if APA owed no duty to them. They assert that the District Court's finding that APA owed no duty necessarily means that the RLA does not apply to this conduct. For support, Appellants rely on *Krantz v. Air Line Pilots Association, International,* 427 S.E.2d 326 (Va. 1993), where the Virginia Supreme Court held that the RLA did not preempt a job applicant's right to sue a union for tortious interference with prospective employment. While expressing no opinion on the *Krantz* holding itself, Appellants' situation is distinguishable. The court in *Krantz* based its decision on the proposition that a job applicant "has no federally protected right" to employment under the RLA. *Krantz,* 427 S.E.2d at 329-30. Here

Appellants seek to protect their rights in an existing employment relation as provided by the relevant collective bargaining agreements and the statutory protections of the RLA. These rights stem from federal law, so *Krantz* is inapposite.

The rights and duties of unions in carrying out their representational functions is an area where "the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Condon v. Local 2944, United Steelworkers,* 683 F.2d 590, 594-95 (1st Cir. 1982) (quoting *Local 20, Teamsters Union v. Morton,* 377 U.S. 252, 261, 84 S.Ct. 1253, 1259, 12 L.Ed.2d 280 (1964)). The importance of uniform relations among employees, unions, and employers may call for preemption of state protections of federal rights, even where federal law does not impose an analogous duty. *See Kaufman v. Allied Pilots Ass'n,* 274 F.3d 197 (5th Cir. 2001) (holding airline passengers' state-law claims against union preempted by federal law, despite lack of equivalent remedy to passengers). Appellants' relief for any violations of their contractual or statutory rights must come in the manner prescribed by federal law.

Appellants argue with respect to the claims against American, that the RLA cannot apply to the period of time for which Appellants were not employed by American and thus the state-law claims cannot be preempted. Appellants rest their argument primarily on our decision in *Felice v. Sever,* 985 F.2d 1221 (3d Cir. 1993). In *Felice,* we held that state-law claims that did not implicate a collective bargaining agreement covered by § 301(a) of the Labor Management Relations Act (LMRA) did not give rise to immunity of union officials under § 301(b). In part, we reasoned that because the plaintiff in that case was not covered by a collective bargaining agreement and thus not represented by a labor

organization, § 301 did not apply to the relationship between the parties and could not serve to preempt state law. This case, though instructive, is not directly applicable because it involves provisions of the LMRA which have no corresponding provision in the RLA.

Appellants urge that the RLA and its arbitration provisions only apply to disputes between a carrier and its employees. However, the plain language of the statute does not support such a limitation on the RLA's scope. The RLA covers "disputes between an employee or group of employees and a carrier or carriers by air" not merely disputes between a carrier and its own employees. RLA § 204, 45 U.S.C. § 184. We thus believe that congressional intent was to submit such disputes to the RLA resolution mechanisms. *See Pyles v. United Air Lines, Inc.*, 79 F.3d 1046, 1050-52 (11th Cir. 1996) (holding that employees of one carrier may seek relief under the RLA for disputes with another carrier). Preemption of the state-law claims is therefore appropriate, and Appellants' argument must be rejected.

We conclude that Appellants' state-law claims seek to protect their contractual rights negotiated under the auspices of the RLA and not any independent state-law right. *Cf. Hawaiian Airlines Inc. v. Norris,* 512 U.S. 246, 260-61, 114 S.Ct. 2239, 2247-48, 129 L.Ed.2d 203 (1994) (finding a state whistleblower statute to provide an independent right not to be discharged). Appellants' state-law claims were properly dismissed as preempted by the RLA.

V. Conclusion

We reverse and remand on Count I of Appellants' Second Amended Restated Complaint. We affirm the District Court's dismissal of all remaining Counts of the Second Amended Restated Complaint.

FISHER, *Circuit Judge*, dissenting.

I dissent because I disagree with the majority's analysis of Count I. I join the majority's affirmance of the remainder of the claims on appeal. But I would affirm the district court's determination of the untimeliness of the Class' claims in Count I asserting that the Air Line Pilots Association ("ALPA") breached its duty of fair representation ("duty") under the Railway Labor Act, 45 U.S.C. § 151, et. seq.

A fundamental premise of the majority opinion is that Supplement CC (the November 8, 2001 agreement between American's pilots and American regarding seniority integration of former TWA pilots and American's pilots) was not the inescapable result of the Class' waiver of Allegheny-Mohawk labor protective provisions in April of 2001. The subject of the scope of the waiver and whether it included the right to bargain over seniority integration post-purchase was precisely why American required the waiver of those rights as a condition precedent to its purchase of TWA's assets out of bankruptcy. This was to avoid conflict between the collective bargaining agreements applicable respectively to the American and TWA pilots regarding seniority (which absent the waiver contained irreconcilable seniority provisions).[6] Because the April 2001 waiver clearly and unmistakably included a waiver of the Class' contractual right to arbitrate seniority integration issues and their right to

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[6] The collective bargaining agreement between TWA and its pilots contained *Allegheny-Mohawk* labor protective provisions including the right to arbitrate seniority integration in the event of a merger with another airline. *See Allegheny-Mohawk Merger Case,* 59 C.A.B. 22, 31-40 (1972). The collective bargaining agreement between American and its pilots (represented by the Allied Pilots Association) contained a provision that pilots new to American due to the acquisition of another airline will not begin to accrue seniority until they begin working for American (endtailing). Seniority governs rates of pay, flight schedules and routes, type of airplane flown, whether pilots fly as captain or first officer and their eligibility for furlough and recall.

bargain over seniority after American's purchase of TWA, any claim that ALPA breached its duty of fair representation to the Class accrued at that time.

There were no rays of hope to extend the accrual of the duty of fair representation claims based on ALPA's post-waiver actions or inaction. The waiver and its attendant agreements (the Transition Agreement between the Class pilots and TWA, LLC and the "best efforts" letter from American) eliminated ALPA's ability to effectively bargain with either TWA, LLC or American for any seniority integration different from that which existed at the time of the waiver. Because of the limitations these agreements imposed upon ALPA's ability to bargain with TWA, LLC[7] or American regarding seniority, any meaningful ray of hope was extinguished. The only actions that ALPA could take were collateral to the real issue — a desire by the TWA pilots to get that which was waived in April 2001 — the right to demand a fair and equitable seniority integration. Consequently, the claim that ALPA breached its duty of fair representation is untimely and the district court's grant of summary judgment should be affirmed.[8]

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[7] TWA, LLC was the wholly-owned subsidiary of American that employed the former TWA pilots upon American's purchase of TWA's assets from bankruptcy.

[8] Summary judgment arose in the context of the Appellees' motion to dismiss the second amended class complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because the parties relied on information outside the pleadings, the 12(b)(6) motion was converted to a motion for summary judgment. The Class filed a Rule 56(f) affidavit in opposition to the motion. However, that Affidavit did not provide with any specificity the information sought to be discovered to defeat the pending motion. But the question of the propriety of the conversion in light of the Rule 56 motion is not before us.

I.

The Class alleges in Count I that ALPA violated its duty of fair representation relating to ALPA's representation of TWA pilots both prior and subsequent to American's purchase of TWA out of bankruptcy. The Class contends that in April 2001, ALPA coerced the TWA Master Executive Council into waiving the TWA pilots' contractual labor protective provision to arbitrate over seniority integration because of ALPA's alleged interest in organizing the American pilots, who were then represented by the Allied Pilots Association. In its Second Amended Restated Complaint filed January 27, 2003, the Class pleaded for the first time additional duty claims, all of which flow from the waiver of the right to arbitrate seniority integration. Those claims are that ALPA: (1) failed to require American and TWA, LLC to negotiate the terms of the seniority integration with ALPA while ALPA remained the certified collective bargaining agent for the Class; (2) failed to take action to challenge Supplement CC though the agreement was entered into to control matters relating to rates of pay, rules and working conditions of the Class and was entered into with other than ALPA as the Class' collective bargaining agent in violation of the Railway Labor Act; and (3) that ALPA permitted American and TWA, LLC to require the TWA Master Executive Council[9] to negotiate seniority integration with American's pilots's union, the Allied Pilots Association.

At the crux of the Class' claims are the various agreements made on behalf of the TWA pilots in April of 2001 in relation to American's purchase of TWA assets, which combined to prevent ALPA from negotiating seniority integration for the former TWA pilots. A brief recitation of the relevant

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[9] TWA pilots were represented by ALPA through the Master Executive Council comprised of TWA pilots, including some members of the Class.

agreements evidencing the scope of the waiver and events surrounding their execution is necessary to frame the accrual analysis.

II.

On January 9, 2001, American Airline subsidiary TWA, LLC agreed to purchase TWA assets out of bankruptcy. TWA's January 10, 2001 filing for bankruptcy protection was part of the planned acquisition by American. But an essential condition of American's purchase of the TWA assets was that American, which agreed to hire almost all of TWA's unionized employees through its wholly-owned subsidiary TWA, LLC, required the elimination of labor protective provisions within TWA's collective bargaining agreements with its unions. Specifically, American required the waiver of the right of TWA pilots to arbitrate seniority integration in the event of a purchase of TWA by another airline.

TWA filed a motion in bankruptcy court on March 15, 2001, pursuant to 11 U.S.C. § 1113 seeking to abrogate the TWA-ALPA collective bargaining agreement for the pilots' refusal to forego their seniority integration protections. The TWA pilots were faced with the choice of waiving their seniority integration protections or fighting to retain them at the risk of forcing TWA into liquidation. *See In re Trans World Airlines, Inc.*, 322 F.3d 360 (3d Cir. 2000). In response to the motion, the TWA Master Executive Council resolved to waive the seniority integration protections in exchange for American's assurances that it would "use its reasonable best efforts" with Allied Pilots Association to

"secure a fair and equitable process for the integration of seniority" upon the sale of TWA to American.[10]

TWA and its pilots' Master Executive Council subsequently entered into a Stipulation approved by the Bankruptcy Court on April 6, 2001. Pursuant to that Stipulation, TWA withdrew its section 1113 motion and was authorized to eliminate the seniority integration protections from its pilot's collective bargaining agreement. The terms of the Stipulation and the circumstances and import of the waiver of seniority integration protections were echoed in the April 3, 2001 announcement made to TWA pilots by Robert Pastore, President of the pilot's Master Executive Council.

On April 9, 2001, the Bankruptcy Court approved the sale of TWA's assets, resulting in the Class becoming employees of TWA, LLC. That same date, ALPA and TWA, LLC entered into a "Transition Agreement," providing that ALPA would remain the exclusive bargaining representative for the former TWA pilots until the National Mediation Board found American and TWA, LLC to be a single carrier whose pilots were represented by the Allied Pilots Association. By its terms (set forth in Section 30), the Transition Agreement was not amendable during the transition period and would expire upon National Mediation Board certification of single carrier status. Section 1B of the Transition Agreement further

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[10] The letter by American to TWA Master Executive Council President Robert Pastore provides:

> I understand that you wish to have confirmation of American's commitment on its part with respect to process for resolving integration of seniority. For its part American Airlines, Inc. ("American") agrees to use its reasonable best efforts with its labor organization representing the airline pilots craft or class to secure a fair and equitable process for the integration of seniority. In that regard, American will engage a facilitator to organize meetings with the labor organizations representing airline pilots and American and TWA-LLC. American agrees to adopt the procedures that result from this process for seniority integration.

provided that TWA-LLC could modify the work rules and benefits as necessary upon 21-days notice in order to effect the transition of the former TWA pilots to American. Significantly, during that 21-day notice period, section 1B specified that "in lieu of any bargaining obligations under the Railway Labor Act, TWA, LLC's sole obligation shall be to confer with ALPA on all changes . . ." and provide those changes in writing.

III.

Claims for breach of the duty of fair representation under the Railway Labor Act are subject to a six-month limitations period. *Miklavic v. USAir, Inc.,* 21 F.3d 551, 556 (3d Cir. 1994); *Sisco v. Consolidated Rail Corp.,* 732 F.2d 1188 (3d Cir. 1984) (applying *DelCostello v. Int'l Brotherhood of Teamsters,* 462 U.S. 151, 158 (1983)). The district court concluded that the Class' claims against ALPA for breach of the duty of fair representation accrued at the latest by April 6, 2001, when the Stipulation waiving seniority integration rights was entered by the Bankruptcy Court. The court reasoned that since the resolution waiving seniority integration rights was agreed to on April 2, 2001, and approved by the Bankruptcy Court on April 6, 2001, the claims against ALPA, which were not filed until September 3, 2002, clearly were beyond the six-month limitations period. In so holding, the district court relied upon *Local Lodge No. 1424 v. National Labor Relations Board,* 362 U.S. 411, 415-17 (1960) for the proposition that the limitations period begins to run from the date of the execution of the challenged agreement. *Bensel v. Allied Pilots Ass'n,* 271 F.Supp.2d 616, 622 (D. N.J. 2003).

The majority concluded that *Local Lodge* bars the Class' claims only if the limitations period associated with ALPA's initial breach of its duty accrued on April 6, 2001, and that all subsequent breaches of its duty were "inescapably grounded" in that breach. It did not find that these conditions were met. *Local Lodge,* 362 U.S. at 422. Unlike the majority, however,

I conclude that both of these conditions were met to warrant application of *Local Lodge* for accrual purposes. I disagree that Supplement CC[11] and the allegations that ALPA breached its duty of fair representation post-waiver constituted breaches separate from the initial breach of ALPA's duty — that it coerced the pilots into waiving their seniority integration protections. Rather, I conclude, as the district court recognized, that the waiver subsumed any rights to bargain for seniority integration from April 2001 forward. That includes the claims that subsequent to the waiver, ALPA breached its duty by failing to challenge Supplement CC, failing to negotiate seniority integration with the Allied Pilots Association during the transition period, and permitting American to dictate that seniority integration would be negotiated between the two pilot's unions.

A.

The waiver must be viewed not as a singular act in April 2001 but as a series of agreements that effectively waived any right to bargain for seniority integration with either TWA, LLC or American. First, the TWA Master Executive Council agreed to waive seniority integration protections in exchange for TWA's withdrawal of its bankruptcy motion to eliminate its contractual obligations with its unions. That waiver also was conditioned on American's promise to use

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[11] From February to October 2001, the Allied Pilots Association and the TWA Master Executive Council attempted to negotiate seniority integration terms, even using the services of a mediator paid for by American. When those negotiations failed to produce an agreement regarding seniority integration, American and its pilots executed a seniority integration agreement known as Supplement CC on November 8, 2001, which called for some dovetailing of TWA pilots among the American pilots for seniority purposes. That agreement amended Section 13 of the original agreement between American and its pilots that otherwise would have governed seniority integration. Supplement CC would not become effective until single-carrier designation and certification of a collective bargaining agent for the combined pilot class.

its "best efforts" to facilitate an agreement between the two pilot's unions regarding seniority integration. But that promise by American represented an obligation merely to support the process of negotiation between the dueling unions in their attempt to reach an agreement concerning a "fair and equitable" seniority integration. It was not an obligation for American to bargain with ALPA or the Master Executive Council regarding a "fair and equitable" seniority integration. That is what was forfeited in April 2001 when the seniority integration protections were waived.

Second, the Transition Agreement by its terms was not amendable and expired by its own terms once TWA, LLC and American are deemed a single carrier by the National Mediation Board. Nor did it require that TWA, LLC engage in any bargaining with ALPA regarding changes to work rules or benefits during the transition period. All that was required was written notice 21 days before any changes were to be made.

Given these agreements, the claims concerning ALPA's breach of its duty subsequent to the waiver are in fact "inescapably grounded" in the waiver and the attendant agreements of April of 2001. All that was left was a promise by American to use its "best efforts" to support union to union negotiations regarding seniority integration. The claims that ALPA breached its duty of fair representation thus are inescapably grounded in ALPA's conduct in negotiating the waiver. Consequently, the claims are untimely.[12]

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[12] The majority finds that the claims that ALPA also breached its duty post-waiver are timely using "relation back" under Fed.R.Civ.P. 15(c). However, that analysis is premised on the finding that the initial claim that ALPA breached its duty filed on September 3, 2002 — that ALPA coerced the TWA Master Executive Council into waiving seniority integration given ALPA's interest in organizing the American pilots — was timely filed. For the reasons stated within this opinion, I diverge from the majority's conclusion that "rays of hope" tolled the accrual of

B.

The waiver clearly and unequivocally included the right to bargain with either TWA, LLC or American regarding seniority. See *Gullickson v. Southwest Airline Pilots' Association,* 87 F.3d 1176 (10th Cir. 1996).

Gullickson involved the purchase of Morris Air, whose pilots were non-union, by Southwest Airlines. Southwest sought a waiver of the scope provisions of its agreement with the Southwest pilots' union. Despite the fact that Morris pilots were not represented by it, the Southwest pilots' union met with Morris pilot representatives and obtained a list of priorities regarding job security. Thereafter, the union met with the Southwest and reached a Letter Agreement containing a scope of waiver clause as well as seniority provisions giving Morris pilots an effective seniority date of January 1, 1994. Morris pilots attended various informational meetings conducted by the Southwest pilots' union regarding the terms of that Letter Agreement.

In February 1994, the Southwest pilots' union became the collective bargaining representative for the Morris pilots. Three months later, Morris pilots ratified a collective bargaining agreement. On June 29, 1994, Morris pilots sued the Southwest pilots' union and Southwest for breach of the duty of fair representation resulting from the endtailing of the Morris pilots in the course of a seniority integration and failure to permit Morris pilots an opportunity to ratify the Letter Agreement. But the Court found that the language of the Southwest-Morris collective bargaining agreement was

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the initial claim that ALPA breached its duty until April 2002. Rather, because that breach of duty claim accrued at the time of the waiver, relation back cannot save the claims that ALPA breached it duty subsequent to the waiver. The initial complaint must have been timely in order for relation back to save the claims that ALPA breached its duty subsequent to the waiver. *See e.g., Henderson v. Bolanda,* 253 F.3d 928, 931 (7th Cir. 2001).

sufficiently clear to inform Morris pilots that ratification of it necessarily ratified the effect of the Letter of Agreement between the Southwest pilots union and Southwest regarding seniority integration.

Likewise, as the comments of TWA Master Executive Council President Robert Pastore to the entire pilot group reveal, the TWA Master Executive Council took the best option available — agreeing to the waiver to facilitate the purchase of TWA by American and to save as many contractual provisions as possible while still having to negotiate seniority integration with the American pilots' union during the transition period. This, when coupled with the language of the various agreements (as discussed *supra* at part III.A), supports the conclusion that there was a clear and unmistakable waiver of the right to bargain for seniority. But "[a] voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep contracts, even when they wish they could have made better deals." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1534 (7th Cir. 1992).

IV.

Nor would I apply the "ray of hope" doctrine to toll the accrual of the claims that ALPA breached its duty until April 18, 2002, the date the arbitrator of the System Board of Adjustment denied the Class' challenge based on American's "best efforts" promise. *See Childs v. Penn. Fed'n Brotherhood of Maintenance Way Employees*, 831 F.2d 429, 434 (3d Cir. 1987) (holding that duty of fair representation claim does not accrue while the union continues to actively represent the employee and offers rays of hope that the employee's cause will prevail). The Class contends, and the majority accepted, that ALPA's arbitration of American's alleged breach of

its "best efforts" letter necessarily impacted the viability of Supplement CC, which could have resulted in the invalidation of Supplement CC.

The fundamental flaw in the majority's application of the *Childs* "ray of hope" doctrine is its reliance on the premise that Supplement CC was not the inescapable result of the waiver of the seniority integration protections in April of 2001. "Rays of hope" cannot sustain a claim when the waiver of seniority integration protections gutted any chance that ALPA could continue to represent the Class to reach a more advantageous seniority integration agreement. For the reasons stated previously, the waiver of seniority integration protections, and the attendant agreements executed in early April 2001, eliminated both contractual and any statutory duties to bargain for seniority thereafter. In other words, it stripped ALPA of any real negotiating strength or bargaining leverage with respect to the seniority integration of former TWA pilots within American. Moreover, even if ALPA prevailed in the arbitration concerning the "best efforts" letter, and American was found to have breached its "best efforts" promise, it still would not eliminate the fact that the Transition Agreement between ALPA and TWA, LLC was not amendable and precluded negotiations with TWA, LLC concerning seniority integration. Nor would a victory require American to bargain with ALPA concerning seniority integration. In order for a "ray of hope" to exist, there must be a meaningful hope that it can remedy the employee's dissatisfaction.

Childs was premised on promoting the federal labor policies of: (1) avoiding unnecessary federal litigation; (2) allowing full play of the administrative procedure; and (3) sparing the employee the Hobson's choice between letting the statute of limitations run and antagonizing his best advocate. 831 F.2d at 434-35, 436. As to avoiding unnecessary federal litigation, *Childs* recognized that "[i]f the union can

indeed remedy the cause of the employee's dissatisfaction, it should be allowed to do so, thus obviating federal judicial involvement." *Childs,* 831 F.2d at 434; *see also Whittle v. Local 641, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 56 F.3d 487 (3d Cir. 1995).

Childs and *Whittle* both dealt with claims to overturn unfavorable arbitration awards on grounds that the union committed errors in the arbitration proceedings. In *Childs,* the union declined to represent Childs before the Board due to a lack of corroborative evidence which Childs claimed to have provided to the Union during the grievance process. In *Whittle,* the union allegedly failed to prosecute a seniority case vigorously before the joint local committee. Those decisions are premised upon the policy to resolve disputes where possible through arbitration, thus obviating the need for judicial involvement if the union is able to remedy the cause to the employees' satisfaction. *See Childs,* 831 F.2d at 434. The claims in those cases therefore did not accrue for statute of limitations purposes until the employee learned of the arbitrator's award. Otherwise, there was no way for employees to know whether they suffered any loss from the union's alleged breach until the arbitration decision issued. *Whittle,* 56 F.3d at 490.

Here, however, the cause of the employee's dissatisfaction was not American's breach of its "best efforts" obligation. Rather, the Class sought exactly that which it sacrificed in order to facilitate American's purchase of TWA — the right to arbitrate or otherwise dictate the seniority integration process. Extending a "ray of hope" here, where the waiver extinguished any meaningful prospect that the TWA pilots could control seniority integration, is not warranted on this record.

IV.

For the foregoing reasons, I would affirm the judgment of the district court granting summary judgment on Count I regarding all of the alleged breaches of the duty of fair representation. I concur in the remainder of the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3176

LEROY BENSEL, individually and as representative of a class consisting of former Trans World Airlines, Inc., pilots employed by TWA Airlines LLC as of April 2001,

Appellant

v.

ALLIED PILOTS ASSOCIATION;
TWA AIRLINES, LLC;
AIR LINE PILOTS ASSOCIATION;
AMERICAN AIRLINES, INC.

SUR PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER and VAN ANTWERPEN, *Circuit Judges*

The petition for rehearing filed by Appellee, Air Line Pilots Association, Int'l, having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

By the Court,

/s/ Franklin S. Van Antwerpen
Circuit Judge

DATED: November 23, 2004

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LEROY "BUD" BENSEL, et al., Plaintiffs, v. ALLIED PILOTS ASSOCIATION, AIR LINE PILOTS ASSOCIATION, AMERICAN AIRLINES, INC., and TWA AIRLINES, LLC, Defendants.	HONORABLE JOSEPH E. IRENAS CIVIL ACTION NO. 02-2917 (JEI) **OPINION**

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IRENAS, Senior District Judge:

Presently before the Court are motions of all three Defendants to dismiss the second amended restated complaint. In addition, Plaintiffs have filed a cross-motion to dismiss Count X of their second amended restated complaint without prejudice. In both the motion papers brought before this Court and during oral argument, matters outside of the

pleadings have been presented to the Court. Accordingly, as required under Fed.R.Civ.P. 12(c), the Court will treat all motions as motions for summary judgment rather than motions to dismiss. The Court will grant the Defendants' motions and will dismiss on all counts.

I.

After several years of failing to make a profit, on January 9, 2001, Trans World Airlines, Inc. ("TWA") entered into an agreement with Defendant American Airlines, Inc. ("American") whereby American agreed to purchase the majority of TWA's assets following TWA's filing for Chapter 11 bankruptcy protection. TWA made such a filing the following day, January 10, 2001. As a condition of the purchase agreement, American agreed to hire almost all of TWA's unionized employees provided that certain labor protective provisions in their various contracts were eliminated.

One of those provisions concerned the right of TWA's pilots to bring to arbitration issues of seniority integration in the event of a purchase of TWA or merger of TWA with another airline. These rights are also known as Allegheny-Mohawk rights, in reference to an earlier airline merger. American indicated that it would not proceed with its purchase of TWA unless this seniority integration provision was eliminated.[1] TWA's pilots were represented by Defendant Air Line Pilots Association ("ALPA"), through its TWA Master Executive Council ("TWA MEC") unit.[2] Under

[1] During oral argument the parties spent a significant amount of time arguing over the question of whether American would have backed out of its agreement to purchase the TWA assets had ALPA not agreed to the waiver of the seniority integration rights. For purposes of the motions before this Court, however, that question is irrelevant, particularly as it relates to statute of limitations issues.

[2] Some members of the class of Plaintiffs in this case were also members of the TWA MEC.

American's collective bargaining agreement with its pilots, represented by Defendant Allied Pilots Association ("APA"), the seniority of any new pilots to American, due to an acquisition by American, would begin to accrue only at the moment that the pilots began working for American.

The TWA MEC resisted waiving its seniority protections, and on March 15, 2001, TWA filed a motion under 11 U.S.C. § 1113 with the Bankruptcy Court seeking to abrogate the seniority provisions in its collective bargaining agreement with ALPA. In response, on April 2, 2001, the TWA MEC passed a resolution waiving its seniority provisions in exchange for a letter from American in which American promised to "use its reasonable best efforts" with APA to "secure a fair and equitable process for the integration of seniority." On April 6, 2001, the Bankruptcy Court entered a stipulation and order withdrawing the § 1113 motion and formalizing the waiver agreement.[3]

On April 9, 2001, ALPA and the TWA MEC entered into a transition agreement with what would become, upon completion of the asset purchase by American, TWA Airlines, LLC ("TWA-LLC"). TWA-LLC would be a wholly owned subsidiary of American. Under that agreement, the majority of the provisions of the collective bargaining agreement between ALPA and TWA would remain in effect until such time as TWA-LLC and American were declared a "single carrier" by the National Mediation Board ("NMB"). In addition, ALPA would continue to remain the exclusive representative of the TWA-LLC pilots until the "single

[3] There is a great deal of uncertainty as to what the result would have been had American gone through with its purchase of the TWA assets, but ALPA not waived its seniority integration protections. Of course, it was precisely this uncertainly that most likely influenced American to request the waiver by ALPA.

carrier" declaration. The next day, on April 10, 2001, American's purchase of TWA's assets closed and TWA-LLC began operations as a separate air carrier.

Between at least February and August of 2001, the TWA MEC and APA negotiated with each other over seniority integration. No agreement was reached between the parties. On November 8, 2001, APA and American reached an independent agreement on seniority integration of former TWA pilots, known as Supplement CC. Under Supplement CC, some TWA pilots did receive credit for their seniority, and certain captains and first officer positions were guaranteed for former TWA pilots at the remaining pilot base for TWA-LLC pilots, in St. Louis, Missouri. It is likely that the impact upon the airline industry of September 11, 2001, and the knowledge of the parties that layoffs were probably inevitable, had a significant influence on the negotiations between American and APA.

On November 9, 2001, APA filed a petition with the NMB seeking the declaration of "single carrier" status. ALPA opposed this petition, but on March 5, 2002, the NMB declared that TWA-LLC and American were a "single carrier." On April 3, 2002, after ALPA declined to submit an application to become the bargaining representative for the combined pilot group, the NMB certified APA as the sole bargaining agent for all American pilots and Supplement CC became effective. Following this declaration, ALPA pursued a grievance against American, through arbitration, alleging that American violated the promise it made to ALPA in the letter it wrote concurrently with the waiver agreement. The grievance alleged that American did not use its "reasonable best efforts" to protect the TWA-LLC pilots' seniority protections, as it had agreed to do in its letter. Through the arbitration, ALPA sought the nullification of Supplement CC. The arbitrator, in a decision dated April 18, 2002, rejected the grievance and found for American.

This matter originally appeared before the Court when APA filed an action, on June 19, 2002, against class representative Bensel, the Aviation Workers Rights Foundation, Inc., and American, seeking a declaratory judgment that it did not owe a duty of fair representation to the class of former TWA-LLC pilots and that Supplement CC was binding and valid. On September 3, 2002, a class action was initiated by a virtually identical class against ALPA. On October 3, 2002, the class filed an answer in the original matter, along with counterclaims and cross-claims against APA, ALPA, American, and TWA-LLC. Pursuant to a series of consent orders agreed to by all parties, the parties were realigned with the class as Plaintiffs and ALPA, APA, American, and TWA-LLC as Defendants. The class filed a second amended restated complaint against the four Defendants on January 27, 2003. The Court's order dismissing the original action preserved the original filing dates for statute of limitations purposes.

The second amended restated complaint alleges breach of the duty of fair representation by ALPA (Count I), breach of the duty of fair representation by APA (Count II), breach of fiduciary duties and duty to treat with certified representative by APA, ALPA, American, and TWA-LLC (Count III), breach of the obligation to assert every reasonable opportunity and maintain agreements and to negotiate in good faith by American and TWA-LLC (Count IV), tortuous and malicious interference by APA, American, and TWA-LLC (Count V), fraudulent misrepresentation by APA, American, and TWA-LLC (Count VI), breach of contract and tortuous interference by APA, American, and TWA-LLC (Count VII), breach of the duty of good faith and fair dealing and tortuous interference by APA and American (Count VIII), and conspiracy by APA, ALPA, American, and TWA-LLC (Count IX). In Count X, the Plaintiffs seek to enforce an arbitration

award. All four Defendants have filed motions to dismiss on all claims against them, which the Court will treat as summary judgment motions.

II.

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)).

In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir. 1986). The role of the court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III.

A.

Plaintiffs allege in Count I that ALPA violated its duty of fair representation ("DFR") under the Railway Labor Act, 45 U.S.C. § 151 et seq. (the "RLA"). DFR claims under the RLA are subject to a six month statute of limitations. *Miklavic v. USAir, Inc.,* 21 F.3d 551, 556 (3d Cir. 1994); *Sisco v. Consolidated Rail Corp.,* 732 F.2d 1188, 1194 (3d Cir. 1984). The limitations period begins to run from the date of the execution of the challenged agreement. *Local Lodge No. 1424 v. Nat'l Labor Relations Bd.,* 362 U.S. 411, 415-16, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960) ("*Bryan Manufacturing*"); *see also United Indep. Flight Officers, Inc. v. United Air Lines, Inc.,* 756 F.2d 1262, 1273 (7th Cir. 1985) (holding that

in a DFR suit against a union, in this case also ALPA, the statute of limitations began to run when the relevant supplemental agreement was signed).

The general thrust of Plaintiffs' allegations in Count I is that:

> [i]n causing the Class to waive their Allegheny-Mohawk rights, agree to a settlement of the bankruptcy 1113 motion and enter into the TWA-LLC Transition Agreement with TWA-LLC, all of which resulted in the Class becoming purportedly bound by the unfair and oppressive terms of Supplement CC, ALPA through its representatives, coerced the TWA pilots and made and permitted to be made false misrepresentations to the TWA-MEC which they knew to be false and which induced their capitulation. (Second Am. Restated Compl. ¶ 101.)

Plaintiffs go on to enumerate various ways in which they were "coerced." It must be noted that the Plaintiffs are not making any claim against ALPA regarding Supplement CC, instead they are making a claim regarding their waiver of their seniority integration rights, which later led to the implementation of Supplement CC.

Plaintiffs also detail other alleged DFR violations, most of which are simply the logical result of the earlier waiver. These include "[f]ailing to require American and TWA-LLC to negotiate the terms of seniority integration and the terms and conditions of the TWA-Pilots employment with ALPA while ALPA remained the certified collective bargaining agent for the Class" and "[p]ermitting American and TWA-LLC to require the TWA-MEC to negotiate seniority integration with APA." (Second Am. Restated Compl. ¶ 107.) The failure to require negotiations with ALPA really occurred when that right was bargained away at the time of the waiver, as once the seniority integration provisions had

been waived, it is questionable what was left to be bargained over. There can be no question that the requirement that the TWA-MEC negotiate directly with APA was a direct result of the waiver agreement. Plaintiffs cannot argue that the date of the actual negotiations is relevant for limitations purposes, as a "continuing violation," since a "continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Cowell v. Palmer Township,* 263 F.3d 286, 293 (3d Cir. 2001) (quoting *Ocean Acres Ltd. v. Dare County Bd. of Health,* 707 F.2d 103, 106 (4th Cir. 1983)). The negotiations themselves between the TWA MEC and APA, and the failure to negotiate between TWA-LLC and ALPA, were both "continual ill effects" of the original violation.[4]

The date of the resolution waiving the seniority integration provisions was April 2, 2001, and the date of the Bankruptcy Court approval of the agreement and withdrawal of the § 1113 motion was April 6, 2001. For statute of limitations purposes, Plaintiffs had six months from April 2, 2001, or at the latest April 6, 2001, to file any action challenging the waiver agreement. Plaintiffs did not file any claims against ALPA until September 3, 2002. Plaintiffs cannot argue that at the time of the waiver they were not aware of the harm that would occur, since it stands to reason that the bargaining away of seniority rights, and the agreement on the process that would be used to determine seniority integration, clearly put the TWA pilots in a weak position compared to the

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[4] Even if the Court were to consider the failure to require TWA-LLC and American to negotiate the terms of seniority integration directly with ALPA to be a separate alleged DFR breach, independent from the waiver agreement, it would still fail on statute of limitations grounds. Supplement CC was agreed to on November 8, 2001. Certainly by that point there was nothing left, in terms of the issue of seniority integration, for ALPA to negotiate with TWA-LLC or American. Plaintiffs did not file their claims against ALPA until September 3, 2002, more than six months after the November 8, 2001 signing of Supplement CC.

American pilots and could have led to no other final conclusion but a reduction in their seniority integration rights. *See May v. Shuttle, Inc.*, 129 F.3d 165, 177 (D.C. Cir. 1997) (stating that the limitations period begins to run when plaintiffs knew or should have known of their injury). In any case, when the subject of a DFR allegation is a labor agreement, as is the case here with the waiver, it is the date of the agreement that is important. On its face, Count I fails for statute of limitations reasons.

Plaintiffs argue that the presence of an ongoing arbitration proceeding, finally decided on April 18, 2002, effectively tolled the limitations period under the "rays of hope" doctrine. Under this doctrine, as long as there are "rays of hope" that the union will arbitrate the employee's grievance, or that an arbitrator's decision is pending, the limitations period does not commence until the arbitrator's decision is announced. *Childs v. Pennsylvania Fed'n Bhd. of Maintenance Way Employees*, 831 F.2d 429, 434 (3d Cir. 1987); *see also Whittle v. Local 641, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 56 F.3d 487, 490 (3d Cir. 1995).

This doctrine, however, applies only when the alleged DFR breach of the union is directly related to the instant arbitration proceeding. *See Childs*, 831 F.2d at 434 (quoting *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986) by stating "where a duty of fair representation suit seeks to overturn an unfavorable arbitration award on the ground that the union committed errors in the arbitration proceedings, the claim accrues when the the [sic] employee learns of the arbitrator's award."). In this case, the arbitration proceeding was not related to an employee grievance. Instead, it was a challenge to Supplement CC and American's role in negotiating that agreement. The goal of the arbitration was to have Supplement CC, not the waiver agreement, overturned on grounds that American violated the waiver agreement. In the

arbitration, the waiver agreement itself was not challenged. Plaintiffs have therefore not alleged a DFR breach by ALPA related to that arbitration. In fact, Plaintiffs primary allegation of a DFR breach is related to the seniority waiver, not to the subsequent implementation of Supplement CC. Therefore, the "rays of hope" doctrine does not apply in this case.

There are a few isolated charges in Count I that are not related to the waiver decision. Plaintiffs allege that ALPA should have sought representational rights of the combined pilot group and that ALPA should have challenged the certification of APA as the collective bargaining agent for the combined pilot group. This is basically one allegation, that ALPA did not attempt to become the collective bargaining representative to the combined pilot group. This is an isolated DFR allegation that is unrelated to the others, for seniority integration issues had already been decided long before ALPA could have attempted to become the combined pilot group representative. Unfortunately for Plaintiffs, there is no precedent for a holding that the failure of a union to attempt to become the collective bargaining representative for a group of employees constitutes a breach of the duty of fair representation. *See Dycus v. N.L.R.B.*, 615 F.2d 820, 826 n. 2 (9th Cir. 1980) (stating that a union's withdrawal as bargaining agent does not constitute a DFR breach). Accordingly, these provisions of Count I must be dismissed on summary judgment.

Plaintiffs, in Count I, also claim that ALPA breached its DFR obligations when it failed to challenge Supplement CC, following its approval. The Plaintiffs would have had ALPA legally challenge an agreement entered into between American and its pilots, represented by APA. While Supplement CC did affect the TWA-LLC pilots, in reality it was an agreement between American and APA, affecting a change in the collective bargaining agreement between those two entities. The fact that American and APA were able to

come to such an agreement without involving ALPA or the TWA-MEC is directly related to the TWA-MEC waiving the TWA-LLC pilots' seniority protections. This indicates that this aspect of Count I should also be dismissed on statute of limitations grounds. In addition, ALPA would have had no legal basis for bringing a suit challenging Supplement CC, as there is no DFR right of one union to challenge an agreement legally signed by another union and its employer. ALPA's decision not to bring a futile challenge to Supplement CC cannot constitute a DFR breach. In fact, ALPA did bring the one action, the arbitration grievance against American, that it did have as a viable option to eliminate Supplement CC. This claim must be dismissed under Rule 12(b)(6), because no DFR breach has been alleged and because the claim is time barred.

Plaintiffs also argue a DFR breach in Count I against ALPA for failing to take action to enforce an arbitration award issued on May 26, 2002. As ALPA's DFR obligations terminated on April 3, 2002, when APA was named the exclusive bargaining representative for the combined pilot group, this claim must be dismissed. Finally, the generic claim that ALPA "[o]therwise fail[ed] to take action to protect the seniority and jobs of the Class and otherwise act [ed] in a manner adverse to the Class' interest," cannot succeed on its own, as it does not allege any specific DFR breach against ALPA. Consequently, the entirety of Count I must be dismissed for either reasons of timeliness or failure to actually state a DFR breach.

B.

In Count II of Plaintiffs' second amended restated complaint they allege a DFR breach by APA. The primary allegations in Count II concern alleged DFR breaches prior to APA's certification as the collective bargaining agent for the combined pilot group on April 3, 2002. While there are allegations that APA has breached its DFR obligations since

April 3, 2002, these allegations are either too general in nature to specify any actual DFR breach (Second Am. Restated Compl. ¶ 126), or simply state that APA "continues to this day to fail to negotiate a fair and equitable integration of the TWA pilots." (Second Am. Restated Compl. ¶ 125.) As there was nothing to negotiate once Supplement CC became effective, this allegation fails to state any DFR breach.

The remainder of Count II must be dismissed because APA simply did not owe the Plaintiffs any duty of fair representation under the RLA prior to April 3, 2002. Instead it was ALPA, as the TWA-LLC pilots' exclusive representative, that owed that duty. The duty of fair representation arises out of a union's role as the exclusive bargaining representative for an employee unit. *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). In this case, ALPA was the exclusive representative of the TWA pilots until the NMB's certification of APA as the representative. It is the NMB that has the exclusive authority to certify who is the exclusive representative of a group of employees. *Switchmen's Union of North America v. Nat'l Mediation Bd.,* 320 U.S. 297, 303, 64 S.Ct. 95, 88 L.Ed. 61 (1943).

As the NMB did not certify APA as the representative for the TWA pilots until April 3, 2002, APA did not owe any duty of fair representation to the Plaintiffs until that date. *See Dycus,* 615 F.2d at 827 ("[a] labor organization that is not the exclusive representative of a bargaining unit . . . owes no duty of fair representation to the members of the unit"). Plaintiffs' attempts to argue case law where unions have been held to owe a duty of fair representation to non-members fails for the simple reason that the non-members in those cases were still members of the bargaining unit. *See, e.g. Wallace Corp. v. N.L.R.B.,* 323 U.S. 248, 255, 65 S.Ct. 238, 89 L.Ed. 216 (1944). In this case, the bargaining unit of TWA-LLC pilots was represented by ALPA, not APA. In very similar circumstances, the 9th Circuit held that, in a

merger between Reno Air and American, Reno Air flight attendants were not owed DFR obligations by the union for American flight attendants until the NMB certified the American flight attendants' union as the exclusive bargaining agent for both sets of flight attendants. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants,* 275 F.3d 1165 (9th Cir. 2002). Plaintiffs' allegations in Count II must be dismissed.

C.

Count III of Plaintiffs' second amended restated complaint is against all four Defendants. There is nothing in the language of Count III, however, that alleges any complaint against ALPA. Therefore, as a preliminary matter, Count III must be dismissed against ALPA.

The majority of Count III alleges actions attributable to TWA-LLC and American. In particular, Plaintiffs allege violations of the RLA and its requirement that the carrier "treat," or negotiate with, the collective bargaining representative of the carrier. 45 U.S.C. § 152 Ninth. As the APA is not a carrier, it could not have violated such a duty. The language of Claim III primarily details alleged failures of Defendants American and TWA-LLC to negotiate directly with ALPA the terms of Supplement CC and the seniority integration of the TWA pilots. These allegations regarding "duty to treat" are therefore not relevant to APA.

Plaintiffs do allege, in Count III, breach of fiduciary duties against APA. They allege that APA, "in negotiating with ALPA . . . owed the Class a fiduciary duty of good faith and to treat the Class fairly." (Second Am. Restated Compl. ¶ 136.) There is no such duty of good faith detailed in the RLA. Instead, this is simply a restatement of the Plaintiffs' allegations against APA in Count II, that Plaintiff breached its duty of fair representation. This is a separate claim from one arguing a failure to "treat" with ALPA, and altering the language used in the Count does not change the fact that the

same complaint as in Count II is being alleged. While Plaintiffs do not argue in their submissions to the Court that they are really asserting a state law ground in Count III, had they done so that argument would be rejected, for "one cannot avoid federal preemption of alleged state law claims by artfully phrasing the language in the complaint." *Johnson v. United Food and Commercial Workers, Int'l Union Local No. 23,* 828 F.2d 961, 967 (3d Cir. 1987). Therefore, for the reasons set forth previously as to why Count II will be dismissed, the allegations in Count III against APA must be dismissed.

TWA-LLC and American argue that Count III (and Count IV) must be dismissed for lack of standing. Plaintiffs' allegation in Count III is that Defendants failed to "treat" with their representative at the time, ALPA, as required under 45 U.S.C. § 152 Ninth. Under the RLA, employees have the right to "bargain collectively through representatives of their own choosing." 45 U.S.C. § 152 Fourth. The language of the RLA implies that there can only be one representative at one time for a group of employees. 45 U.S.C. § 152 Ninth (stating that if there is a dispute the carrier must "treat" with the representative certified by the NMB). TWA-LLC and American argue that only certified representatives have standing under 45 U.S.C. § 152 to bring a cause of action. While the Third Circuit has not ruled on this issue, the Sixth Circuit has held that there is no express or implied right of action conferred upon an uncertified union under the RLA. *Adams v. Federal Express Corp.,* 547 F.2d 319, 322 (6th Cir. 1976).

This Court finds that under the RLA the Plaintiffs do not have standing. There is no express provision of the RLA providing for a private cause of action. Therefore, it is imperative that the Court determine whether there is an implied private cause of action. The focus of any inquiry into whether a private cause of action can be implied is on two factors:

whether the plaintiff is a member of the class whose benefit the statute was intended, and whether there is evidence of Congressional intent to create a cause of action. *Mallenbaum v. Adelphia Communications Corp.*, 74 F.3d 465, 469 (3d Cir. 1996); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

The Plaintiffs in this case are not within the definition of the class that the statute is designed to protect. The carrier is directed to "treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152 Ninth. Under the RLA, it is clearly ALPA that was the appropriate representative that the duty to "treat" applied to. Plaintiffs do not dispute that their complaint is that the Defendants did not "treat" with ALPA. Consequently, it is ALPA, certified representative of the TWA-LLC pilots, that the statute is intended to benefit. The statute does not state that the carrier must "treat" with its employees, but rather with their representative. If any disgruntled employee could bring a private cause of action under the RLA alleging a failure to "treat," then the purpose of the statute, to provide for an organized process of negotiation between one employee representative and the employer, would be undermined. ALPA was that representative, and it is to ALPA that the private cause of action must accrue.[5] Consequently, Plaintiffs lack standing under the RLA to bring Count III regarding a breach of the duty to "treat".

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[5] This holding can be easily distinguished from the unpublished holding of *People Express Pilot Merger Comm. v. Texas Air Corp.*, 1987 WL 18450 (D.N.J. 1987). In that case, the court held that the plaintiffs were the proper representative for RLA purposes and could bring suit, even though they were not the certified union for the pilots. However, in *People Express*, the pilots were non-union and there was no competing group representing them on seniority issues. In the instant case, the pilots have had representation through ALPA, and then APA, on the seniority integration issues during the entire merger process.

The language of the statute, while it may imply a Congressional intent to create a private cause of action, does not imply that Congress intended to create a private cause of action for any employee or group declaring itself to be a representative of the relevant employees. The provisions of 45 U.S.C. § 152 indicate that employees will designate a representative and that representative will conduct negotiations with their employer. If Congress intended to create a private cause of action, it must be the representative for the employee group that the cause of action was intended to benefit. Count III will be dismissed on summary judgment.

D.

In Count IV, brought against TWA-LLC and American, Plaintiffs assert a breach of the obligation to exert every reasonable effort to assert every reasonable opportunity and maintain agreements and to negotiate in good faith. Plaintiffs claim, in Count IV, that this is a duty found in 45 U.S.C. § 152 First. (Second Am. Restated Compl. ¶ 143.) However, the actual language of § 152 First is that "it shall be the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . between the carrier and the employees thereof." Nowhere in the RLA is there an explicit duty to negotiate in good faith, although this is certainly implied throughout § 152, particularly in 45 U.S.C. § 152 Second ("[a]ll disputes . . . shall be considered, and, if possible, decided . . . in conference between representatives designated"). The duty to "treat" also may imply a duty to negotiate in good faith. However, both of these provisions do not provide a private cause of action for the Plaintiffs, as detailed by this Court above, since under both it is only ALPA that has an implied private cause of action.

In addition, in describing their claims in Count IV, Plaintiffs state that the basis for them is that "American and TWA-LLC refused to negotiate with the Class and its

representative." (Second Am. Restated Compl. ¶ 144.) Again, the only language in the RLA requiring negotiations refers to negotiations with the employees' designated representatives, in this case ALPA, and possibly after April 3, 2002, APA. For the same reasons detailed above, only the designated or certified representative of the employees has standing under the RLA to bring such claims. Accordingly, Count IV must also be dismissed.[6]

E.

Counts V, VI, VII, VIII, and IX of the second amended restated complaint all allege state common law violations. Under well settled law, the RLA preempts such state law causes of action in labor disputes, and all five counts must be dismissed.

In the field of labor relations, the federal government enjoys wide preemptive power over state laws, and states may not regulate activities that federal labor laws protect or prohibit. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *see also Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.,* 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). This *Garmon* rule has been extended to cover the RLA. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 380-81, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969); *see also May,* 129 F.3d at 177.

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[6] Even had this Court determined that Plaintiffs did have standing to bring Counts III and IV, it is likely that both Counts would have been dismissed based simply on the language of the RLA requirements. 45 U.S.C. § 152 involves duties between a carrier and its employees. According to the NMB, TWA-LLC and American were operating as separate carriers until March 5, 2002. Until that point in time, it is doubtful that American owed any duty under the RLA to the TWA-LLC pilots, or that TWA-LLC had any legal duty, or ability, to influence American's implementation of Supplement CC.

In this case, the duty of fair representation clearly preempts the state law claims alleged by Plaintiffs. The DFR obligation requires that the interests of union members be served "without hostility or discrimination toward any" and that discretion is exercised "with complete good faith and honesty" and "arbitrary conduct" is avoided. *Vaca,* 386 U.S. at 177, 87 S.Ct. 903. This is a broad federal assertion of power in the area of labor relations and it preempts all of the state law claims in Counts V through IX, which are in reality only variations of RLA DFR claims. Taken together and individually, they assert that the Defendants discriminated against the Plaintiffs, acted in bad faith and dishonestly towards the Plaintiffs, and that the Plaintiffs were treated arbitrarily.

In fact, all of the state law claims asserted have been ruled preempted under the RLA by other federal courts. Examples include tortuous and malicious interference (Count V), in the case of *Nellis v. Air Line Pilots Ass'n,* 15 F.3d 50, 51 (4th Cir. 1994); fraudulent misrepresentation (Count VI), in *May,* 129 F.3d at 179 (claim of fraud); breach of contract (Count VII), in *Arnold v. Air Midwest, Inc.,* 1994 WL 247442 (D.Kan. 1994); and breach of the duty of good faith and fair dealing (Count VIII), in *Carter v. Smith Food King,* 765 F.2d 916, 921 (9th Cir. 1985). Count IX alleges common law conspiracy, which does not exist if the underlying allegations are dismissed.

Plaintiffs argue that since they are not alleging DFR violations again TWA-LLC and American, and if the Court, as it has, finds that APA owes no duty of fair representation to the Plaintiffs, that preemption does not apply. They argue

that since the duty of fair representation does not apply to these Defendants, they should not receive the benefit of a preemption defense.[7]

Plaintiffs' argument fails to understand the justifications for the preemption doctrine. The doctrine applies precisely when state law conflicts with federal labor law. *Brotherhood of R.R. Trainmen,* 394 U.S. at 381, 89 S.Ct. 1109 ("[t]he determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme'") (quoting *Int'l Ass'n of Machinists A.F.L.-C.I.O. v. Central Airlines, Inc.,* 372 U.S. 682, 691-92, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963)). The state law claims alleged by Plaintiffs are clearly preempted by the RLA's DFR requirements. Simply because the RLA may not find such conduct illegal does not mean that preemption is still not required. Counts V, VI, VII, VIII, and IX will be dismissed against all Defendants.[8]

F.

All parties, including Plaintiffs, have made motions to dismiss or for summary judgment with regard to Count X. The Plaintiffs ask that the Count be dismissed without prejudice, while ALPA seeks dismissal with prejudice, APA seeks dismissal with or without prejudice but asks for attorneys' fees and costs, and TWA-LLC and American seek dismissal with prejudice. Count X seeks to enforce an arbitration award

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[7] While uncommon, there are occasions when an employer can be sued for a DFR violation under the RLA. *See Sisco,* 732 F.2d at 1190. Plaintiffs have simply chosen not to bring such an allegation in this case.

[8] American and TWA-LLC also seek dismissal of Count VII on grounds that it is a "minor dispute" and therefore must be dismissed under the RLA. As the Court has dismissed Count VII on preemption grounds, this argument will not be discussed.

issued on May 26, 2002, regarding the closing of former TWA domicile bases in New York, Los Angeles, and San Francisco, and alleges that ALPA and APA have breached their DFR obligations by not acting to enforce the award. The arbitrator ruled in favor of the TWA pilots and awarded compensation, as well as ordering TWA-LLC to discuss with the pilots methods of utilizing those sites as satellites of the St. Louis domicile for a limited period of time.

On January 27, 2003, American filed a complaint with the United States District Court for the Northern District of Texas seeking to vacate the award. Later that same day the Plaintiffs filed their second amended restated complaint, which included Count X. Plaintiffs note that APA has determined that it will file a counterclaim in the Texas matter to enforce the arbitration award, and therefore they have filed a motion for summary judgment seeking to dismiss Count X. However, they seek to have such a dismissal be without prejudice, should APA fail to file and adequately defend the counterclaim.

As the arbitrator's award was handed down subsequent to ALPA being replaced by APA as the pilots' exclusive bargaining agent, ALPA did not owe any duty of fair representation to the Plaintiffs. Consequently, Count X will be dismissed against ALPA with prejudice.

As against APA, since the union has no objection to a dismissal without prejudice, the Court will dismiss Count X without prejudice. APA has also made a motion for attorneys' fees and costs. Courts do sometimes award fees when a plaintiff voluntarily dismisses an action without prejudice under Fed.R.Civ.P. 41(a)(2). *United States ex rel. Haskins v. Omega Inst., Inc.,* 25 F.Supp.2d 510, 515 (D.N.J. 1998) (Brotman, J.). The relevant factors that a court must look at in determining whether to award fees are: (1) any excessive and duplicative expenses of a possible second litigation; (2) the effort and expense occurred by the defendant in preparing

for trial; (3) the extent to which the litigation has progressed; and (4) the plaintiff's diligence in moving to dismiss. *United States ex rel. Haskins,* 25 F.Supp.2d at 516.

An analysis of these factors leads to the conclusion that an award of fees would not be appropriate in this case. There is unlikely to be a second litigation since APA seems to be fighting for the rights of its pilots in this matter, and there will most likely be no need for a second litigation. In addition, there would not be many duplicative expenses in a new litigation since the process here remains in its early stages. APA cannot have made significant effort or expense to prepare for trial on the issue in Count X. In fact, the matter here would seem to be a long way from trial, and has not even progressed to the discovery stage. In addition, Count X was filed on January 27, 2003, and Plaintiffs filed their motion to dismiss on April 7, 2003. This does not indicate that Plaintiffs have been dilatory in bringing their motion. Accordingly, the motion for attorneys' fees and costs will be denied.

TWA-LLC and American argue that Count X must be dismissed under the "first to file" rule. Under this rule, when there is concurrent jurisdiction in two federal district courts, the case filed first shall proceed and the second case must be dismissed. *See E.E.O.C. v. Univ. of Pennsylvania,* 850 F.2d 969, 971 (3d Cir. 1988). Against TWA-LLC and American, Plaintiffs only seek to confirm the arbitration award. In the Northern District of Texas litigation, American has filed to vacate the award while APA will file a counterclaim to confirm the award. As against TWA-LLC and American, therefore, the two actions are virtually identical and the "first to file" rule will be followed by this Court. Count X, as against TWA-LLC and American, will be dismissed with prejudice.

IV.

For the reasons detailed in this opinion, all Counts in the Plaintiffs' second amended restated complaint will be dismissed. Count X, as against Defendant APA only, will be dismissed without prejudice, and APA's motion for fees will be denied. The Court will issue an appropriate order.

Dated: _____

_____

JOSEPH E. IRENAS, S.U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LEROY "BUD" BENSEL, et al., Plaintiffs v. ALLIED PILOTS ASSOCIATION, AIR LINE PILOTS ASSOCIATION, AMERICAN AIRLINES, INC., and TWA AIRLINES, LLC, Defendants.	HONORABLE JOSEPH E. IRENAS CIVIL ACTION NO. 02-2917 (JEI) **ORDER**

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IRENAS, Senior District Judge:

This matter having appeared before the Court upon Defendants' motions to dismiss, Plaintiffs' motion to dismiss Count X without prejudice, and Plaintiffs' motion for attorney fees and costs, the Court having reviewed the submissions of the parties and having heard oral argument, for the reasons

set forth in an opinion issued by this Court, which findings of fact and conclusions of law are incorporated herein by reference, and for good cause appearing,

IT IS on this 18th day of July, 2003,

ORDERED THAT:

1. Defendants' motions to dismiss will be treated as motions for summary judgment and will be **GRANTED** as to Counts I, II, III, IV, V, VI, VII, VIII, and IX of the Plaintiffs' second amended restated complaint.

2. Defendants Air Line Pilots Association, American Airlines, Inc., and TWA Airlines, LLC's motions to dismiss Count X of the Plaintiffs' second amended restated complaint will be treated as motions for summary judgment and will be **GRANTED**.

3. Defendant Allied Pilots Association's motion to dismiss Count X of the second amended restated complaint will be treated as a motion for summary judgment and Count X will be **DISMISSED WITHOUT PREJUDICE** as to Allied Pilots Association only.

4. Plaintiffs' motion for attorney fees and costs will be **DENIED**.

JOSEPH E. IRENAS, S.U.S.D.J.

(2)

Supreme Court, U.S.
FILED
MAR 24 2005
OFFICE OF THE CLERK

No. 04-1145

IN THE

Supreme Court of the United States

LEROY "BUD" BENSEL, JAMES ARTHUR, PATRICK BRADY, THEODORE A. CASE, MATTHEW J. COMLISH, DARSHANPRIT DHILLON, LEMUEL A. DOUGHERTY, MICHAEL V. FINUCAN, JOHN S. HEFLEY, HOWARD B. HOLLANDER, ROBERT A. PASTORE and SALLY YOUNG, individually and as members of a class consisting of former Trans World Airlines, Inc., pilots employed by TWA Airlines, LLC as of April 2001,

Petitioners,

v.

ALLIED PILOTS ASSOCIATION, TWA AIRLINES, LLC, AIR LINE PILOTS ASSOCIATION and AMERICAN AIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ALLIED PILOTS ASSOCIATION

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QUESTIONS PRESENTED

The questions presented by the instant Petition are as follows:

1. Whether the requested writ should be granted when the claim petitioners present is untimely and there is no confusion among or conflict between the Courts of Appeals concerning the chief legal issue asserted.

2. Whether the exclusive collective bargaining representative of the employees in a particular collective bargaining unit may retroactively be held to owe a duty of fair representation to persons in another collective bargaining unit with their own exclusive collective bargaining representative certified by the National Mediation Board, which representative they are actively pursuing for alleged breaches of the duty.

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IN THE

Supreme Court of the United States

LEROY "BUD" BENSEL, JAMES ARTHUR, PATRICK BRADY, THEODORE A. CASE, MATTHEW J. COMLISH, DARSHANPRIT DHILLON, LEMUEL A. DOUGHERTY, MICHAEL V. FINUCAN, JOHN S. HEFLEY, HOWARD B. HOLLANDER, ROBERT A. PASTORE and SALLY YOUNG, individually and as members of a class consisting of former Trans World Airlines, Inc., pilots employed by TWA Airlines, LLC as of April 2001,

Petitioners,

v.

ALLIED PILOTS ASSOCIATION, TWA AIRLINES, LLC, AIR LINE PILOTS ASSOCIATION and AMERICAN AIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ALLIED PILOTS ASSOCIATION

BRIEF IN OPPOSITION

Respondent Allied Pilots Association ("APA") respectfully submits that the Petition should be denied. The essence of petitioners' claim is that they were somehow entitled to exclusive representation by two labor unions at the same time, even though one of those unions, the APA, was indisputably the exclusive representative of an entirely different bargaining unit of employees, a unit with differing interests in how seniority integration with petitioners' bargaining unit should be handled. Petitioners' novel theory of extra-unit

representation need never be reached in the first place in this case, however, because their claim against the APA is time-barred. The theory itself is based on an extension of this Court's holding in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952), that finds no support in this Court's decisions following *Howard* and no support in post-*Howard* decisions of the Courts of Appeals. The theory would also undermine the exclusive jurisdiction of the National Mediation Board ("NMB") to determine the representative of a given collective bargaining unit and therefore conflict with *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). Finally, significant public policy concerns argue persuasively against the adoption of any such theory.

COUNTER-STATEMENT OF CASE

Petitioners are members of a class of airline pilots formerly employed by Trans World Airlines, Inc. ("TWA"), who, as a result of a purchase in bankruptcy of TWA assets by American Airlines, Inc. ("AA"), became employees of an AA subsidiary, TWA LLC, in April 2001. At all relevant times both before April 2001 and continuing until April 3, 2002, the class members' exclusive collective bargaining representative was the Air Line Pilots Association ("ALPA"). At all relevant times, the incumbent AA pilots' exclusive collective bargaining representative was the APA. Only on April 3, 2002, did the NMB certify the APA to represent both pilot groups.

The class initially brought this suit against ALPA and APA on September 3, 2002, and subsequently expanded the action to include claims against AA and TWA LLC. The gravamen of the complaint was that, although the classmembers maintained their relative seniority status as between themselves when the AA and TWA LLC pilot bargaining units were combined on April 3, 2002, they did not receive the seniority status they desired in relation to the incumbent AA

pilots. The seniority structure applicable to the combined pilot unit as of April 3, 2002, had been established in Supplement CC to the AA/APA collective bargaining agreement, which had been executed by APA and AA on November 8, 2001.

Among the ten federal and state law claims in its Complaint, the class charged ALPA, as its exclusive bargaining representative, with breaching its duty of fair representation to them prior to April 3, 2002, *inter alia*, by allegedly failing to challenge Supplement CC once it was executed on November 8, 2001; failing to negotiate more attractive seniority placements for the classmembers with either AA or TWA LCC; failing to challenge APA's certification by the NMB as the representative of the combined pilot unit on April 3, 2002; and failing itself to seek to represent the combined pilot unit. Petition at A-11, 12.

The class also brought a two part claim for breach of the duty of fair representation against the APA. One facet of the claim charged that, although ALPA exclusively represented the incumbent AA pilots prior to April 3, 2002, the APA somehow also owed a duty of fair representation to the classmembers prior to that date and breached that duty by entering into Supplement CC in November 2001. The second facet of the claim charged the APA with breaching the duty after it was certified to represent the class on April 3, 2002, by not renegotiating Supplement CC to provide a more attractive seniority arrangement for the classmembers.

Although the District Court dismissed the breach of duty claim against ALPA on limitations grounds, the Third Circuit reversed and remanded the claim, and the class is currently pursuing the claim against ALPA in the District Court. The District Court granted summary judgment in the APA's favor and dismissed the two part breach of duty claim against it on the grounds that (1) APA owed no such duty to the class prior to its certification to represent the classmembers on April 3,

2002, because the classmembers were not members of the bargaining unit the APA was certified to represent prior to that date; and (2) the APA committed no actionable breach after certification. The Third Circuit affirmed on both issues. The District Court dismissed all claims against AA and TWA LLC and also dismissed all state law claims against all parties as preempted by federal law. The Third Circuit affirmed all of these judgments.

In their Petition, petitioners bring no challenge to the decisions below with respect to ALPA, AA or TWA LLC and no challenge to the decisions with respect to the state law claims against any party. Neither do they challenge the dismissal of their claim that APA breached the duty of fair representation to them after it had been certified as their bargaining representative. The only challenge raised here is to the decisions below that the APA did not have—and therefore could not be deemed to have breached—a duty of fair representation to the classmembers prior to its certification as the representative of the combined AA/TWA LLC pilot bargaining unit on April 3, 2002.

COUNTER-STATEMENT OF FACTS

After surviving a number of bankruptcies, by the Spring of 2000, TWA determined that it could no longer continue as an independent airline; it therefore commenced discussions with AA over the possibility of AA's purchasing TWA's assets and providing continuing employment to TWA's employees. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 286 (3d Cir. 2003). AA agreed to an asset purchase plan in the context of a bankruptcy filing by TWA. *Id.* The Bankruptcy Court determined that AA's offer was not only the highest and best offer for the assets but also the only proposal that would preserve the jobs of TWA's 20,000 employees. *Id.* at 287, 293. If the sale did not go forward, the Court concluded, TWA would most likely be liquidated. *Id.*

In order to ensure that AA would, in fact, complete the purchase and hire the TWA pilots, petitioners, through their certified, exclusive bargaining representative ALPA, agreed to delete certain labor protective provisions from the pre-existing ALPA/TWA collective bargaining agreement. Petition at 5-6. Those protective provisions would have enabled petitioners, through ALPA, to force arbitration of seniority integration issues if they were dissatisfied with the seniority placement offered them at AA. *Id.* The collective bargaining agreement negotiated between ALPA and TWA LLC to cover petitioners' terms and conditions of employment while at TWA LLC, the TWA LLC/ALPA Transition Agreement, carried forward the seniority system operative at TWA to apply at TWA LLC for a temporary period. A1031-32. Upon the integration of the TWA LLC and AA pilot bargaining units, the TWA LLC/ALPA Transition Agreement, and the TWA LLC seniority system contained within it, were to "terminate in all respects." A1040. The Transition Agreement made no mention of the seniority the former TWA pilots might have once they became employed in a combined pilot unit at AA. A0550.

At all times prior to the TWA transaction, AA's collective bargaining agreement with the APA provided for a pilot seniority system. As pertinent here, Section 13 of the AA/APA agreement provided that pilots first coming to AA, whether as new hires or through an acquisition, only received and began to accrue seniority as of the dates the pilots actually began to perform pilot duties at AA. A0058, 0292-94. At all relevant times, petitioners were aware of Section 13 and its terms; at all relevant times, they were also aware that the bulk of the incumbent American pilots, whom the APA had a duty to represent, opposed the integration of seniority lists in a manner other than that provided by Section 13. A0054, 0058.

As part of the agreement to waive the labor protective provisions of the TWA/ALPA collective bargaining agreement, ALPA won a promise from AA to use its "best efforts" to secure a "fair and equitable" process for determining seniority integration. Petition at 5. Consistent with that agreement and although not compelled to do so, the APA agreed in a written Facilitation Agreement to enter into negotiations with ALPA over seniority integration to be mediated by a "facilitator" retained by AA, thus delivering to the TWA LLC pilots the agreed upon benefits of their waiver bargain. A0319-23.[1] Those negotiations began in February 2001 and ultimately extended into October 2001. A0325. At all times before, during and after these negotiations and until April 3, 2002, the APA made clear to the TWA LLC pilots that it represented the incumbent AA pilots and not the TWA LLC pilots. A0073.

Although the ALPA and APA negotiators reached common ground on significant methodological issues, they were not able to reach final agreement on the terms of an integrated seniority list. *Id.*; A0059. Rather than simply revert to a straightforward application of the pre-existing Section 13 of the AA/APA collective bargaining agreement (*i.e.*, a simple "end-tailing" of the TWA LLC pilots), however, the APA used the methodologies developed in its negotiations with ALPA in negotiating a modification of Section 13 with AA. The modified agreement "dovetailed" large numbers of TWA LLC pilots with the incumbent AA pilots and also included conditions and restrictions that protected the jobs, captain and first officer positions and promotional opportunities for the TWA LLC pilots at the sole remaining TWA LLC pilot base in St. Louis. A0058-60, 0324-40. The modification, known as Supplement CC, was executed by the APA and AA on

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[1] ALPA ultimately filed a grievance alleging that AA breached its "best efforts" commitment, but an arbitrator decided otherwise. A0453-61. Neither ALPA nor the class ever challenged that arbitration decision.

November 8, 2001. A0059-60. Supplement CC made no changes whatsoever in the relative seniority position of any TWA LLC pilot vis-a-vis any other TWA LLC pilot. Petition at A0032.

When on November 9, 2001, APA petitioned the NMB to declare that AA and TWA LLC constituted a single employer for representational purposes, both ALPA and its TWA LLC unit, the TWA LLC Master Executive Council (including several class representatives here), opposed the petition, contending that AA and TWA LLC did *not* constitute a single employer. A0060, 0517, 0540. The NMB decided otherwise on March 5, 2002, finding that the two carriers constituted a single employer. *Am. Airlines, Inc.*, 29 NMB 201 (2002). In that decision, the NMB gave ALPA thirty days to present a sufficient showing of interest in representing the combined pilot unit. *Id.* The NMB also directed that during the thirty day period, ALPA would continue to serve as the exclusive bargaining representative of the TWA LLC pilots, and the APA would continue to serve as the exclusive representative of the incumbent AA pilots. *Id.* When ALPA formally disclaimed interest in representing the combined pilot group, on April 3, 2002, the NMB extended the APA's certification to represent all pilots in the combined unit and extinguished ALPA's certification. *Am. Airlines, Inc.*, 29 NMB 260 (2002). According to their express terms, on that date the ALPA/TWA LLC Transition Agreement terminated "in all respects," and Supplement CC and the rest of the AA/APA collective bargaining agreement became applicable to the TWA LLC pilots. A1040.

REASONS FOR DENYING WRIT

I. The central act petitioners seek to reach through the retroactive imposition of a duty of fair representation on the APA prior to its certification as their representative is the negotiation and execution of Supplement CC. Indeed, Sup-

plement CC established the seniority integration system of which petitioners complain, and petitioners identify no other pre-certification act by the APA that arguably injured them. It is not necessary to resolve petitioners' theory in this case, however, because any claim that APA breached a duty to petitioners prior to certification is untimely.[2] For this reason alone, the instant petition should be denied. *Busby v. Elec. Utils. Employees Union*, 323 U.S. 72, 75 (1944).

It is well established that when a party claims injury as a result of a labor union's entry into a collective bargaining agreement, the limitations period for a breach of duty claim against the union runs from the date of the execution of the agreement. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 415-17 (1960). The fact that the allegedly injurious terms of the agreement are not implemented until a later date neither tolls the limitations period nor gives rise to a separate cause of action upon implementation. *Id.* at 422-23 ("[T]he vice in the enforcement of this agreement is manifestly not independent of the legality of its execution."); *see also Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979) ("The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.")). This rule governs in cases involving a seniority system; the limitations period for complaints about the operation of the system begins to run when the system is adopted, not when it is applied. *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 909 (1989).

The statute of limitations for a breach of duty of fair representation claim is six months. *DelCostello v. IBT*, 462

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[2] The APA raised the timeliness issue in each of the courts below. However, because both courts held that the APA had no pre-certification duty to petitioners, they did not reach the issue.

U.S. 151, 171-72 (1983). Although Supplement CC was executed on November 8, 2001, the class did not file suit against the APA until September 3, 2002—almost ten full months after their pre-certification breach of duty claim arose. *See* Petition at 3 n.2.[3] Thus, the claim petitioners raise for this Court's consideration is untimely, and resolution of their novel representational duty theory would not be necessary.

II. Petitioners concede that they were not members of the particular bargaining unit for which the APA was the exclusive bargaining representative during the time period during which they seek to impose the duty of fair representation on the APA. There can be no dispute that the judicially imposed duty of fair representation derives directly from and depends on a labor union's role as the exclusive representative of a particular bargaining unit of employees. *See, e.g., Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998) ("When a labor organization has been selected as the exclusive representative of the employees in a bargaining unit, it has a duty, implied from its status . . . as the exclusive representative of the employees in the unit, to represent all members fairly."); *Schneider Moving & Storage v. Robbins*, 466 U.S. 364, 376 n.22 (1984) ("A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for

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[3] Even if the petitioners' claim could be held to relate back to the date the APA filed its own complaint in the instant action (June 19, 2002), the result would remain the same because June 19, 2002, is over seven months after their pre-certification breach of duty claim arose. *See* Petition at 3 n.2. No relation back to February 2002, when the APA filed a similar suit in Texas, is possible because that suit was dismissed not on the merits but on personal jurisdiction grounds, *id.*; thus that filing could not toll the running of the limitations period. *Nelson v. Local 854 Dock Loaders*, 993 F.2d 496, 498-99 (5th Cir. 1993); *Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988).

all the employees within the unit."); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). And only the NMB has jurisdiction under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188, to determine the exclusive representative of a bargaining unit. *Switchmen's Union*, 320 U.S. at 303.

Faced with this obdurate legal reality, petitioners reach for a theory that might extend the duty beyond the confines of the collective bargaining unit the APA was certified to represent even though that theory would compromise the APA's ability to fulfill its duty to the pilots it was actually certified to represent—the incumbent AA pilots. They also reach for a theory that would impose on the APA a duty to them during the same time period that ALPA unquestionably owed them precisely the same duty, and for ALPA's alleged breach of which petitioners are currently pursuing ALPA in the District Court.

Petitioners' theory is subdivided into three contentions: first, that their expanded view of this Court's holding in *Howard* somehow survived the limitations placed on that holding by *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), and still survives in the Courts of Appeals; second, that the Court somehow "revitalized" petitioners' expanded view of *Howard*, albeit *sub silentio*, in *Breininger v. Sheet Metal Workers International Ass'n Local Union No. 6*, 493 U.S. 67 (1989), a decision concerning the operation of a union hiring hall under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq.*; and third, that their expanded view of *Howard* somehow lives on in a series of cases holding that an uncertified union may voluntarily assume the duty if it holds itself out as the representative of a given group of workers and the workers rely on that union as their representative.

As demonstrated below, none of these contentions can withstand scrutiny, particularly in the context of the instant case.

A. To the extent that petitioners would read *Howard* to impose a generalized duty of fair representation on labor unions to employees outside of the bargaining units the unions "exclusively" represent, *Howard* would indeed be anomalous. That, of course, is not the applicable law as set forth in *Vaca*, this Court's seminal statement on the duty's reach, and as subsequently reiterated in *Schneider Moving & Storage* and, most recently, *Marquez*. Moreover, that is not even how the *Howard* Court couched its own holding. On the contrary, as the *Howard* Court put the matter, "The Federal Act [the RLA] thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." 343 U.S. at 774. In short, *Howard* barred unions certified under the RLA from racially motivated depredations against other employees. The dissent in *Howard* also recognized the limited scope of the majority opinion: "The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to fair representation by the Brotherhood, but because they are Negroes who were discriminated against by the carrier at the behest of the Brotherhood." *Id.* at 777-78 (Minton, J. dissenting).[4]

When this Court broached the question of *Howard*'s reach in *Allied Chemical*, it underscored the same limited ambit evident in *Howard* itself:

> In *Howard* we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The

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[4] The *Howard* majority recognized that the black employees at issue, while designated "porters," actually performed all of the functions of the white "brakemen" who sought to eliminate their jobs. 343 U.S. at 770-71. Functionally, then, the black "porters" and white "brakemen" were members of the same bargaining unit and would formally have been considered as such but for the racial discrimination at issue in the case. *Id.*

> reach and rationale of *Howard* are a matter of some conjecture. . . . But whatever its theory, the case obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.

404 U.S. at 181 n.20.

Thus, either taken on its own terms or as interpreted by *Allied Chemical*, *Howard* can have no applicability here. No racial discrimination was involved or alleged in this case, and the APA did not force AA to eliminate anyone's job. At worst, Supplement CC gave the TWA LLC pilots less seniority in the combined pilot unit than they desired; but it is well established that those pilots had no pre-existing right to any particular level of seniority at their new employer.[5]

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[5] In the absence of a statutory pronouncement to the contrary—and the RLA has none—seniority rights arise from and are defined by the pertinent union contract. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21 (1947); *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949); *see, e.g., Wightman v. Springfield Terminal Ry.*, 100 F.3d 228, 232 (1st Cir. 1996) (in the absence of a contract, seniority rights do not exist). As creatures of contract, moreover, seniority rights do not "vest." *Wightman*, 100 F.3d at 232; *McMullans v. Kan., Okla. & Gulf Ry.*, 229 F.2d 50, 53 (10th Cir. 1956); *Local 1251 UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968). Instead, seniority rights are subject to revision or even termination with the termination or renegotiation of the pertinent collective bargaining agreement on which those rights depend. *Wightman*, 100 F.3d at 232; *Dempsey v. Atchison, Topeka & Santa Fe Ry.*, 16 F.3d 832, 839 (7th Cir. 1994); *Robertshaw Controls Co.*, 405 F.2d at 33; *McMullans*, 229 F.2d at 53. Thus, in a merger or acquisition situation, outside of seniority rights an employee may gain pursuant to the bargaining agreement in effect at his or her new employer, an employee "acquired" as the result of a merger or similar corporate transaction has no statutorily protected right to seniority. *NLRB v. Whiting Milk Corp.*, 342 F.2d 8, 10 (1st Cir. 1965). Accordingly, once the TWA LLC/ALPA Transition Agreement terminated, the only seniority "right" any TWA LLC pilot had at AA was as defined by the AA/APA agreement and its Supplement CC.

Notwithstanding petitioners' contentions to the contrary, there simply is no "tension" or confusion among the Courts of Appeals as to the reach of *Howard* after *Allied Chemical*. Absent extraordinary circumstances not present in this case, *see infra* at 18-19, the Courts of Appeals, including the Third Circuit in this case, have uniformly held that a union like the APA owes no duty to persons like petitioners who are not part of the bargaining unit the union is certified to represent, even if such persons have previously been or might in the future become members of that unit. *See, e.g., Allen v. CSX Transp., Inc.*, 325 F.3d 768, 772-74 (6th Cir. 2003); *Spenlau v. CSX Transp., Inc.*, 279 F.3d 1313, 1315-16 (11th Cir. 2002); *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002); *Merk v. Jewel Cos.*, 848 F.2d 761, 766 (7th Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 181 (8th Cir. 1984); *Cooper v. Gen. Motors Corp.*, 651 F.2d 249, 250 (5th Cir. 1981); *see also Riser Foods*, 309 NLRB 635, 636 (1992).[6]

The notion that the Third Circuit has taken a mixed approach to the matter, Petition at 14-15, is demonstrably incorrect. For instance, the Third Circuit did not hold that employment "applicants" were to be treated as members of a bargaining unit for duty of fair representation purposes in *Peterson v. Lehigh Valley District Council*, 676 F.2d 81, 87

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[6] *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974), cited in Petition at 16, is not to the contrary. In *Jones* a union was found to have breached the duty of fair representation to a group of non-union passenger relations agents who were disadvantaged when the union entered into a new agreement with the employer that favored union members over those who were not union members. The *Jones* Court, however, expressly found that the agents, although not members of the union, were in fact "members of the collective bargaining unit" to which the union owed a duty. *Jones*, 495 F.2d at 798. Thus, while *Jones* certainly does stand for the proposition that a union owes a duty to all members of the pertinent bargaining *unit*—regardless of whether they are members of the *union*—it does not hold that a union owes a duty to people outside the *unit*.

(3d Cir. 1982). Rather, the Court specifically found that, at the time the alleged breaches of duty in the case took place, the employees at issue had already been "hired" and were actually working in the bargaining unit. *Id.* And while the district court in *Felice v. Sever*, 985 F.2d 1221 (3d Cir. 1993), may have made comments suggesting that the duty of fair representation could theoretically extend to persons outside of the bargaining unit, the Circuit itself engaged in no such speculation and squarely held that the duty did not run to someone, who, while a union member, did not work in the pertinent bargaining unit represented by the union at issue. *Id.* at 1228-29.

Nedd v. United Mine Workers of America, 556 F.2d 190 (3d Cir. 1977), can hardly be read to create a tension with *Allied Chemical* itself or with either *Peterson*, *Felice* or the Third Circuit's decision in this case. In *Nedd*, a group of retirees sued their union for breach of duty when, in its role as the authority responsible for appointing the majority of the trustees for a jointly administered pension trust fund, the union unilaterally took on the task of collecting delinquent employer contributions to the fund and failed at that task, thereby decreasing the assets available to pay pensions. 556 F.2d at 195. The *Nedd* court distinguished *Allied Chemical* on the ground that when the union unilaterally undertook a duty to non-members of the bargaining unit that it was not obligated to undertake, the union "was not then entitled to act in a manner which discriminated against the pensioners." 556 F.2d at 200.

Thus, far from standing for the notion that a union has an indwelling legal duty to people who are not members of a bargaining unit the union is certified to represent, *Nedd*, like the "holding out" cases discussed *infra* at 18-19, only stands for the proposition that when a union voluntarily elects to

reach beyond its legal obligations on behalf of a group, it must carry out its voluntarily assumed duties "fairly."[7]

Petitioners' effort to find some *Howard*-related tension in the Sixth Circuit is similarly spurious. *See* Petition at 16. As even petitioners concede, *McTighe v. Mechanics Educational Society of America, Local 19*, 772 F.2d 210 (6th Cir. 1985), stands firmly for the proposition that a union owes no duty to one who, although he may in the past have been part of the unit, at the time of the events in question, was no longer part of the bargaining unit (having left to become a supervisor). Contrary to petitioners' contention, *Woosley v. Avco Corp.*, 944 F.2d 313 (6th Cir. 1991), in no way reverses course on the matter. Indeed, no union was party to the case, and the duty of fair representation was in no way implicated. Instead, *Woosley* only held that the provisions of the particular bargaining agreement at issue gave a former unit member serving as a supervisor a firm right to return to his unit. *Id.* at 317.

In short, there is simply no confusion among the Courts of Appeals as to the meaning of *Howard* in the wake of *Allied Chemical* and therefore no need for this Court to resolve or "clarify" the limits of a union's duty in general or the APA's duty in this case.

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[7] *Nedd* has no applicability here because the APA never volunteered to represent the petitioners in negotiating Supplement CC. On the contrary, the APA negotiated that modification to the AA/APA collective bargaining agreement only on behalf of the incumbent AA pilots the APA had a duty to represent. To the extent that Supplement CC introduced terms into the AA/APA bargaining agreement that would be applicable to people who might subsequently become AA employees, Supplement CC is no different from any term of a collective bargaining agreement that becomes applicable to workers who enter the bargaining unit subsequent to the negotiation of the agreement. As the Seventh Circuit pointed out in *ALPA v. United Air Lines, Inc.*, 802 F.2d 886, 917 (7th Cir. 1986), under the RLA, "A union is required to bargain over the terms and conditions of employment that will be in place when future employees take their positions."

B. Although *Breininger* does not even mention *Howard*, petitioners would find in it emanations of *Howard* on the assumed premise that *Breininger* and other NLRA hiring hall cases stand for the proposition that a union has a duty to represent people, chiefly hiring hall registrants, who are not members of a given bargaining unit. That premise, however, is simply wrong.

The premise is wrong, first, because a union authorized to operate a hiring hall under the NLRA is authorized to do so only in its role as the certified representative of the employees in a particular bargaining unit established under a collective bargaining agreement. As *Breininger* itself defined the situation,

> Only because of its status as a [National Labor Relations] Board-certified bargaining representative and by virtue of the power granted to it by the collective-bargaining agreement does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion, because *the members of the bargaining unit* have entrusted the union with the task of representing them.

493 U.S. at 87-88 (emphasis added); *see also Jacoby v. NLRB*, 325 F.3d 301, 305 (D.C. Cir. 2003) (in operating a hiring hall, a union is "acting under the authority of these statutes as the exclusive agent for employees in designated collective bargaining units").

Second, petitioners are wrong because under the NLRA, registrants at hiring halls—including those "who have never been hired in the first place"—are nonetheless deemed to be "employees" and therefore included in the bargaining unit the union operating the hiring hall represents. *Allied Chemical*, 404 U.S. at 168; *Local 872, ILA*, 163 NLRB 586 (1967). Thus, when *Breininger* and other NLRA hiring hall cases speak in terms of a union's duty to hiring hall registrants,

they are speaking about a duty owed only to bargaining unit members.

The source of petitioners' confusion on this issue is apparent. While the NLRA deems hiring hall registrants to be "employees" and therefore members of a given bargaining unit, under the RLA, which governs in this case (and which makes no provision for the operation of a hiring hall in the first place), job applicants are not "employees" or members of a bargaining unit. On the contrary, under the RLA, one becomes an "employee" only when one actually enters "the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service)." 45 U.S.C. § 151 Fifth; *see also* 45 U.S.C. § 181 (similarly defining an airline "employee"). Because petitioners mistakenly attempt to view the hiring hall cases through an RLA lens, they mistakenly conclude that an NLRA hiring hall union's duty extends to people who, under the RLA, would not qualify as members of a bargaining unit. That attempt to mix and match the two very different statutes leads nowhere, however, because the RLA simply does not afford job applicants the status ("employee" and bargaining unit member) necessary to qualify for union representation or for the application of the duty of fair representation. *See United Air Lines*, 802 F.2d at 911-14; *Eastern Air Lines v. ALPA*, 920 F.2d 722, 727 (11th Cir. 1990).

The hiring hall cases do not even have any significance here as an analogy because the strict duties imposed on hiring hall operators are imposed in recognition of the fact that in operating a hiring hall, unions exercise an employer-like function—*i.e.*, the ability to grant or deny employment. *Breininger*, 493 U.S. at 88-89. That level of authority simply does not exist in the RLA context or in this case, where the APA neither sought to play nor did play any role in hiring employees for AA or in denying employment to anyone. All the APA did was to negotiate a seniority system with AA, as

it had every right and duty to do. *United Air Lines*, 802 F.2d at 917.[8] And the seniority system devised by Supplement CC created a far more advantageous situation for TWA LLC pilots than they would have had under the pre-existing Section 13 of the AA/APA collective bargaining agreement.[9]

C. As the last leg of their theoretical tripod, petitioners advert to a series of cases in which, similar to *Nedd*, a union, although not certified to represent a particular group of workers, voluntarily holds itself out as their representative and therefore takes on a duty to represent them fairly. Petition at 19-21. At the outset it merits mention that in none of the cases cited did the workers at issue actually have their own, pre-existing certified representative with a pre-existing duty to represent them. That distinction is critical because each of the "holding out" cases requires that the workers at issue actually rely on the representations of the "holding out" union. *Mui v. Union of Needletraders*, 213 F.3d 626, No. 99-9147, 2000 WL 669670, at *4 (2d Cir. May 23, 2000); *BIW Deceived v. Local S6 Indus. Union of Marine & Shipbuilding Workers*, 132 F.3d 824, 833 (1st Cir. 1997); *Chavez v. UFCW*, 779 F.2d 1353, 1356 (8th Cir. 1985); *Quarles v. Remington Arms Co.*, 848 F. Supp. 328, 331 (D. Conn. 1994).[10]

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[8] Indeed, had the APA put the interests of the TWA LLC pilots ahead of those of the incumbent AA pilots and "not sought to preserve the seniority of its bargaining unit members to the detriment of those outside the bargaining unit, it would have been remiss in its statutory duty" to the incumbent AA pilots. *McNamara-Blad*, 275 F.3d at 1173.

[9] Granted, before the APA modified Section 13 in Supplement CC, Section 13 would have required the endtailing of all TWA LLC pilots in the combined unit. Because Supplement CC eliminated that aspect of the pre-existing AA/APA agreement and provided any number of special protections for the TWA LLC pilots, *see supra* at 6-7, the endtailing cases cited by petitioners, Petition at 21-22, are inapposite here.

[10] *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 346 (5th Cir. 1980), cited in Petition at 19, is not even a "holding out" case because the Fifth Circuit found that the union at issue had in fact been certified as the unit representative.

In this case, by contrast, during the relevant time period, ALPA was petitioners' certified representative. During that time period, petitioners not only relied on ALPA and ALPA alone to represent them, but they are currently pursuing in the District Court their claim that ALPA breached its duty to them, including, *inter alia*, by failing to challenge Supplement CC. Similarly, their Complaint in this case expressly alleges that the APA repeatedly and publicly announced that it *did not* represent them. *See supra* at 6. Petitioners certainly never believed that the APA was advancing their interests because they well knew that the large majority of APA members favored the application of an unmodified Section 13 to determine petitioners' seniority in the combined unit. *See supra* at 5. Thus, the "holding out" cases can have no applicability here because the critical ingredients in such cases—"holding out" and reliance—are absent.[11]

III. Although petitioners offer several policy reasons for expanding duty of fair representation law to benefit them, they cannot escape the fundamental fact that prior to April 3, 2002, the APA was the exclusive bargaining representative of the incumbent AA pilots and as such had a duty to represent those pilots "exclusively" and to advance their interests. *See, e.g., McNamara-Blad*, 275 F.3d at 1172-73. As late as March 5, 2002, the NMB, the agency with the exclusive authority to designate bargaining representatives in the airline industry, *Switchmen's Union*, 320 U.S. at 303, pointedly reminded all concerned parties that until the NMB determined otherwise, the APA was to continue to represent only the incumbent AA

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[11] Petitioners' reference to cases raising the possibility of a state law duty of fair representation, Petition at 20-21, is of no moment because petitioners have alleged no such duty in this case. On the contrary, although they pled any number of state law claims against the APA, the District Court dismissed all such claims as preempted, the Court of Appeals affirmed, and petitioners have not challenged either decision here.

pilots and ALPA was to continue to represent the petitioners and the other TWA LLC pilots. *See supra* at 7.

The imposition on the APA of a duty to petitioners (and retroactively at that) would not only compromise the APA's ability to fulfill its duty to the pilots it was legally required to represent but would also impermissively invade the NMB's exclusive authority to determine representational relationships in the airline industry. Moreover, to impose precisely the same duty on two separate unions to the same group of employees (*i.e.*, petitioners) during the same time period would create utter confusion among unions as to how, when, or even whether to allocate their representational functions with respect to each other or to the employee groups involved. Such confusion would be particularly acute and potentially paralyzing in a case like this, where the two employee groups involved had differing interests in the way the seniority integration would turn out. Indeed, in this particular case, APA and ALPA negotiated for months over the integration, each operating under a negotiator's basic presumption that they were "two adversarial parties" dealing with each other at "arm's length to further their own economic interests." *A.T. Kearney, Inc. v. IBM*, 73 F.3d 238, 242 (9th Cir. 1995) (citation omitted). Although petitioners feel that they were entitled to two champions at that bargaining table, the imposition of their personal preference would have left the incumbent AA pilots with no champion at all or, at best, a severely conflicted "champion." Neither the RLA, the judicially inferred duty of fair representation, or common sense can tolerate that result.

Finally, while petitioners are correct as to the potential for an increasing number of airline combinations in this country, Petition at 21, they draw the wrong conclusions from that likelihood. Given the uncertain economic situation in the industry, it is reasonable to assume that many of those potential combinations will concern a failing or failed carrier and a

healthy one. If the labor union representing the employees of a healthy carrier knew in advance that it might be required to compromise the interests of the employees it represented because it might one day be burdened with a pre-certification double duty to the employees of the failed carrier, the healthy carrier's union would have every incentive to resist the combination entirely. In such situations, the TWAs of the future would simply be allowed to liquidate, and their employees would lose any chance they might have had for continuing employment. That prospect is hardly in the public interest or in the interest of airline employees.

CONCLUSION

For the foregoing reasons, the APA respectfully requests that the petition for writ of certiorari be denied.

Respectfully Submitted,

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